Supreme Court U.S.
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No. ___

IN THE

Supreme Court of the United States

WILLIAM ASHTON, *et al.*,
Petitioners,

v.

CITY OF MEMPHIS,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a case alleging racial discrimination in violation of the Equal Protection Clause, must the plaintiffs who were personally denied equal treatment "allege and show" that they would have obtained the benefit in question in the absence of discrimination in order to meet Article III standing requirements?

2. In moving for summary judgment, can a defendant defeat plaintiffs' standing simply by identifying a rank order list of those eligible for promotion created from a promotion procedure that was unvalidated and had disparate impact? Alternatively, can a defendant meet its burden under *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977) -- that it would have made the same decision even in the absence of the unconstitutional factor -- by simply identifying such a rank order list?

3. Assuming that a defendant can meet its *Mt. Healthy* burden, can plaintiffs nonetheless recover emotional distress, nominal or other damages as in *Carey v. Piphus*, 435 U.S. 247 (1978)?

PARTIES TO THE PROCEEDING

Petitioners are Frank Amato, William Ashton, Kennon Carlton, Tammy Clevenger, James Coatney, Stephen Comella, Billy Garrett, Thomas Helldorfer, Paul Keating, Richard Kitchens, Russell Lollar, George Maxwell, Frederick Sansom, Tom Simmons, Dale Simms, Dana Stine, Robert J. Stone, Roy Tidwell, James Wiley, John R. Wright, and James Wright. They were plaintiffs in two actions consolidated in the District Court and appellants in the appeals consolidated in the Court of Appeals.

Respondent is the City of Memphis. It was a defendant in each of the two actions consolidated in the district court and an appellee in each of the appeals consolidated in the Court of Appeals.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals (App. 1a-7a) is reported at 281 F.3d 516. The decisions of the District Court granting defendants' motion for partial summary judgment on standing grounds (App. 8a-18a), and denying in part and granting in part plaintiffs' motion for reconsideration (App. 19a-29a) are unreported.

An earlier decision of the *en banc* Sixth Circuit, in 1994, vacating a judgment for the defendants is reported at 37 F.3d 1155. After remand, plaintiffs moved for a preliminary injunction concerning a promotion process under consideration, which motion was denied by the district court. Plaintiffs appealed, and moved for an injunction pending appeal. The decision of the Sixth Circuit in January 1996 denying in part and granting in part plaintiffs' motion for a preliminary injunction pending appeal is reported at 1996 U.S. App. LEXIS 1396. The December 1996 decision vacating the district court's order denying the preliminary injunction, and denying in part and granting in part plaintiffs' application for preliminary relief is reported at 1996 U.S. App. LEXIS 34357. The May 1999 decision of the district court concluding that the City of Memphis had violated the Fourteenth Amendment to the United States Constitution by discriminating on the basis of race in promotions is reported at 49 F. Supp. 2d 1051.

JURISDICTION

The judgment of the Court of Appeals was entered on February 19, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Section 2 of Article III of the United States Constitution states in relevant part that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . "

2. The Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

3. 42 U.S.C. § 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction hereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

STATEMENT

This case presents the question of whether plaintiffs seeking relief for racial discrimination in violation of the Equal Protection Clause lack Article III standing if they cannot demonstrate that they would have received a particular benefit -- in this case a promotion to sergeant in a police department -- in the hypothetical absence of the improper racial consideration. The decision below, which put that difficult burden on plaintiffs, is in direct conflict with the explicit holdings of the Fourth and Eleventh Circuits, and

implicit holdings in other circuits.

A. FACTUAL BACKGROUND

This case involves promotions within the City of Memphis Police Department. Petitioners are individuals who were denied promotions to sergeant in 1988 and 1989. Respondent is the City of Memphis ("the City").

In 1974, the United States Department of Justice brought a civil rights action against the City alleging discrimination in the hiring and promotion of City employees. The parties quickly settled. In the settlement, the City denied unlawful activity, but agreed to undertake, as a long term goal, subject to the availability of qualified applicants, the objective of achieving throughout its work force proportions of African Americans and female employees in each job classification approximating the proportion of African Americans and females in the Shelby County civilian work force. *Aiken v. City of Memphis*, 37 F.3d 1155, 1158-59 (6th Cir. 1994) (en banc). The consent decree also precluded the City from using any standard for employment that did not validly measure qualifications for that position.

In 1975, the Afro-American Police Association filed a suit alleging racial discrimination in the promotion practices of the Memphis Police Department. The parties settled this case, and entered into a consent decree dated March 20, 1979. The decree provided that the City would seek to promote a percentage of black applicants, at each rank, consistent with the percentage of black applicants in the next rank below, provided that qualified black applicants were available. *Id.* at 1159; *Ashton v. City of Memphis*, 49 F. Supp. 2d 1051, 1060 (W.D. Tenn. 1999). The Consent Decree provided that the use of a properly validated test

would serve as a defense to any failure to promote African Americans in those numbers. *Aiken*, 37 F.3d at 1164; *Ashton*, 49 F. Supp. 2d at 1060 n.6.

In 1981, the City and the United States amended the 1974 decree. The amended decree specifically incorporated the procedures for filling promotional vacancies from the 1979 decree in *Afro-American Police Ass'n v. Memphis*. *Aiken*, 37 F.3d at 1160. It also required the City to provide reports every four months on the progress it was making towards developing valid selection procedures. C.A. App. 277.

The City's processes for promotion to sergeant in 1988 and 1989 both involved a four-part evaluation of the applicants. The four parts were: (1) an evaluation of the employee's performance record in ten areas of the employee's job, (2) a written examination, (3) an oral interview with a group consisting of a captain, a lieutenant, and three sergeants, and (4) seniority points. *Aiken*, 37 F.3d at 1160; C.A. App. 196; Pls' Opp. To Defs' Partial Summ. Judg. Motion, Ex. 4 (Downs Dep. Tr.), p. 8. A maximum of twenty points was available for each of the performance evaluation and the written examination, fifty points for the oral interview, and ten points for seniority. *Id.* pp. 8-9. In each year, a rank order list was created. *Aiken*, 37 F.3d at 1160.

In 1988, 210 officers competed for 75 possible promotions to sergeant within the Memphis Police Department. *Id.*; App. 10a. Only seven of the top 75 candidates were African American. The City concluded that it would promote additional African Americans to sergeant because (1) African Americans constituted 32.4% of the patrol officers in the Memphis Police Department and (2) the

testing procedure had not been validated to assure job relatedness. *Aiken*, 37 F.3d at 1160; C.A. App. 266. Accordingly, 19 African American candidates (in addition to the seven that were in the top 75) who were ranked between 76 and 132 were promoted. App. 10a. The last 19 white candidates in the top 75 were not promoted. The City promoted the 49 highest-ranking white candidates, and the 26 highest-ranking African Americans. C.A. App. 197. The lowest-ranking promoted white candidate was ranked 53; the lowest ranking promoted African-American candidate was ranked 132. C.A. App. 204-05.

In 1989, 177 officers competed for 94 possible promotions. Only fifteen of the 94 candidates with the highest rank were African American. App. 10a. Again, the City concluded that it would promote additional African Americans to sergeant because of the proportion of African Americans who were patrol officers and because the testing procedure had not been validated to assure job relatedness. C.A. App. 266-67. Accordingly, it promoted 18 African American candidates (in addition to the 15 that were ranked in the top 94) who were ranked between 95 and 142. App. 10a-11a. The lowest-ranking promoted white candidate was ranked 71; the lowest ranking promoted African-American candidate was ranked 142. App. 10a; C.A. App. 210. The last 18 white candidates in the top 94 were not promoted.

The plaintiffs in each case described below (including petitioners) were ranked higher than most of the promoted African American candidates, and thus all were ranked higher than the lowest-ranking promoted African American candidate. App. 10a-11a. They were not promoted.

In 1995 and 1996, the City finally used a promotion procedure for sergeant that had been developed to be, and

validated as, job related. A number of petitioners tested under that procedure, and those that did were selected for promotions. For example, petitioner Dana Stine, who unsuccessfully sought promotions in 1988 and 1989, was ranked 19th among 412 candidates on the 1996 rank order list. Pls' Opp. To Defs' Partial Summ. Judg. Motion, Ex. 16 (Jones Dep. Tr.) & Ex. 1 thereto.

B. PROCEEDINGS BELOW

This case began as two separate proceedings, later consolidated. The first litigation was commenced in 1989 in the Chancery Court of Shelby County by William Ashton and other plaintiffs alleging racial discrimination with respect to the 1988 promotions to sergeant. It was removed to the United States District Court for the Western District of Tennessee in September 1989, and a motion to remand was denied. *Ashton v. City of Memphis*, W.D. Tenn. Civ. No. 89-2863. The second litigation was commenced in January 1990 in the Western District of Tennessee by Russell Aiken and other plaintiffs alleging racial discrimination with respect to the 1989 promotions to sergeant. The City and several of its officials were defendants. *Aiken v. City of Memphis*, W.D. Tenn. Civ. No. 90-2069. An amended complaint adding federal claims was filed in each action in February 1990. The District Court had jurisdiction in both cases pursuant to 28 U.S.C. §§ 1331 and 1343(3), and 42 U.S.C. § 2000e-5(f)(3).

Defendants moved for dismissal and/or summary judgment in each action in March 1990. In June 1990, plaintiffs in each action moved to amend the complaints (to

add Title VII allegations).[1] Without any decision having been rendered on those motions, defendants moved again for summary judgment in each action in August 1991, and made a "supplemental" motion for summary judgment in November 1991. In March 1992, as the City prepared to start yet another promotional process for sergeant, plaintiff O'Connor moved for a preliminary injunction enjoining the City from proceeding with the promotional process during the pendency of the litigation. In support of that motion, O'Connor submitted the affidavit of an expert, Dr. Jack Parrish, who opined that the City could have developed a validated job-related procedure for the 1988 and 1989 promotions. Indeed, Parrish asserted that if the City had started developing a validated test procedure in 1979 (as it had represented it was doing in the *Afro-American Police Officers* case), it could have implemented one in 1984. C.A. App. 161-62.

In June 1992, the court granted defendants' motion for summary judgment, and the clerk subsequently entered a final judgment. Plaintiffs in each action appealed. After an initial panel decision of the Sixth Circuit affirmed the District Court's judgment, 2-1, the *en banc* court vacated that decision and judgment, and agreed to hear the case. (The *Aiken* and *Ashton* appeals were consolidated, along with appeals concerning promotions in the City of Memphis Fire Department.) The *en banc* court vacated the judgment dismissing the case. It concluded that the statistical evidence

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[1] Several years later, in March 1992, the District Court finally granted plaintiffs in each litigation leave to file these second amended complaints. These complaints sought (1) damages for lost salary and benefits, (2) retroactive promotions, (3) other "compensatory damages" of $ 10,000 each, (4) punitive damages of $ 20,000 each, (5) attorneys' fees and costs, and (6) any other just relief.

presented by the City demonstrated a compelling governmental interest, but that an issue of fact existed as to whether the goals were narrowly tailored to meet that compelling governmental interest. *Aiken*, 37 F.3d at 1163-65. With respect to the narrow-tailoring inquiry, the Sixth Circuit expressed particular concern about the City's failure to develop validated promotional procedures, suggesting an overlong duration for the race-conscious remedy. The court also expressed concern about the goals' relationship to the relevant labor markets. *Id.* at 1164-66.

After remand, in July 1996, defendants moved for partial summary judgment against those plaintiffs who are now petitioners in each of the *Ashton* and *Aiken* litigations. Defendants asserted that these plaintiffs would not have been promoted even had the City not employed race preferences in the promotions to sergeant in 1988 and 1989 and, that, accordingly, these plaintiffs (current petitioners) lacked Article III standing. Defendants submitted no affidavit or other admissible evidence in support of their motion.

In November 1997, after reassignment of the cases to a new judge, the court ordered the consolidation for trial of the *Ashton* and *Aiken* litigations. In December 1997, the City submitted a "stipulation" in the consolidated case that it would not raise as a defense the inability to promote any plaintiff due to the absence of vacancies. Despite this representation, defendants continued to press their motion for partial summary judgment.

After some discovery, the plaintiffs in question submitted their opposition to defendants' motions. With that opposition, those plaintiffs submitted another affidavit from their expert, Dr. Parrish. In this affidavit, Parrish asserted that the promotional procedures used by the City in 1988 and

1989 were not job related, and thus did not meet the requirements of local civil service laws, including City of Memphis Charter § 250.1 and City of Memphis ordinance § 9-3.[2] Among the items that Dr. Parrish relied upon to reach this conclusions was the significant weight given to the oral interview.

In a decision and order dated November 17, 1998, the District Court granted defendants' motion for partial summary judgment. It held that Sixth Circuit precedent stood for the proposition that those plaintiffs who would not have been promoted even in the absence of preferential treatment lacked standing. The court held that "[p]laintiffs do not dispute, and have offered no evidence, that absent the City's use of affirmative action the promotions would have been made other than in accordance with strict rank-order." App. 16a.[3]

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[2] Each of those provisions requires that "[a]ll applicants for employment in positions protected by this article shall be subjected to competitive job-related examinations under such rules and regulations as may be adopted by the Director of Personnel."

[3] The District Court's view that plaintiffs did not "dispute" that rank order would have been used was asserted without citation to the record. In fact, although plaintiffs certainly claimed that the use of rank-order *with race preferences* violated the Equal Protection Clause, they never speculated on what the City *would have* used in the absence of race preferences. The District Court also seemed to believe that plaintiffs' "theory of the case" included the proposition that the City should have used the rank order of the non-validated procedure. App. 16a. Although again asserted without citation, this appears to be based on Paragraph 16 of the Second Amended Complaint, which asserted that the procedures used in 1988 and 1989 were valid and proper. It is clear, however, that shortly after plaintiffs moved to file the Second Amended Complaint in 1990, they realized that this allegation simply was not true. All of Dr.

(continued...)

The dismissed plaintiffs moved to reconsider in December 1998, a motion which the District Court granted in part and denied in part. The court rejected plaintiffs' basic challenge to its standing decision, and also rejected plaintiffs' contention that this case was distinguishable because the rank order list had been derived from a hiring process that had not been validated as job related. On the latter point, the District Court found "no merit in the argument that a plaintiff's standing to challenge a discriminatory device turns on whether the device has been validated as being job-related." App. 22a. At the same time, the court granted the motion to reconsider as to several dismissed plaintiffs whose scores had been miscalculated, holding that there was an issue of fact as to what would have happened to those individuals. App. 23a.

In the same order, the court remanded the claims of the dismissed plaintiffs in the *Ashton* litigation back to state court. Since the standing of a plaintiff is a part of a federal court's Article III subject matter jurisdiction, the District Court concluded that 28 U.S.C. § 1447(c) required remand. App. 27a-28a.

The District Court held a non-jury trial on the claims of the remaining plaintiffs from February 16, 1999 through

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[3](...continued)
Parrish's affidavits (starting in 1992) were to the contrary, *i.e.*, they stated that the promotion procedures were *not* valid. It is well-established, of course, that Fed. R. Civ. P. 15(b) permits an amendment of a complaint to conform to the evidence at trial and precludes any plaintiff from being bound by his or her complaint. *E.g.*, *Deakyne v. Comm'rs of Lewes*, 416 F.2d 290, 298 n.15 (3d Cir. 1969) ("Under the Federal Rules of Civil Procedure . . . the plaintiff is not bound by the theory of his pleadings" *quoting Newman v. Zinn*, 164 F.2d 558, 559 (3d Cir. 1947)).

February 19, 1999, and made its findings of fact and conclusions of law in a decision and order dated May 11, 1999. *Ashton v. City of Memphis*, 49 F. Supp. 2d 1051 (W.D. Tenn. 1999). The court concluded that the use of race in the promotion processes for sergeant in 1988 and 1989 was not narrowly-tailored to meet the interest of remedying past discrimination. The court relied heavily on the City's failure to adopt validated promotion procedures, despite its representations as early as 1979 that it would and despite the fact (as Dr. Parrish testified and as the court found) that doing so should only have taken a few years. *Id.* at 1060, 1061 n.7. The court concluded that the City could have created a validated test before 1988, "and that its attempts to do so were meager." *Id.* at 1062. *See also id.* at 1067, 1074. The court also concluded that the defendants failed to produce probative evidence on the relevant labor market, making it impossible to determine the necessity and/or necessary duration of race-conscious measures. *Id.* at 1074 n.31.

In August 1999, the court granted the individual defendants' motion for dismissal on qualified immunity grounds. The City and the remaining plaintiffs thereafter entered into settlement negotiations, which resulted in a consent order settling their claims for damages and equitable relief. At around the same time, the settling plaintiffs submitted affidavits outlining their various injuries, including the emotional and mental distress suffered as a consequence of the City's discrimination. The court entered an order of dismissal, pursuant to both its standing decisions and the consent order settling the remaining claims, on January 14, 2000 (App. 30a-31a), and final judgment was entered on February 29, 2000. The plaintiffs who had been dismissed for want of Article III standing filed timely notices of appeal from each of the January order and the February judgment.

The Sixth Circuit affirmed the judgment of the District Court in a brief decision dated February 19, 2002. App. 1a-7a. The Sixth Circuit concluded that this Court's per curiam decision in *Texas v. Lesage*, 528 U.S. 18 (1999) stood for the proposition:

> If the plaintiffs allege that a racial preference cost them some benefit under a government program, those plaintiffs may have alleged an injury in fact. But if those *same plaintiffs cannot also allege and show* that "under a race-neutral policy" they would have received the benefit, those plaintiffs have not alleged an injury in fact because they have not alleged an invasion of some interest that the law protects.

App. 6a (citing *Lesage*) (emphasis added). The Sixth Circuit recognized that this Court has permitted standing in cases where the plaintiffs allege an inability to "compete on an equal footing," but held that such injury only suffices where the plaintiffs allege "some kind of on-going constitutional violation." App. 6a.

The Sixth Circuit affirmed the judgment dismissing appellants' claims on standing grounds because "[appellants] have neither alleged nor shown that the City would have promoted them if the City had used a race-neutral system in its promotions of police officers" and because they "sought no forward-looking relief that would allow them to compete on an equal footing." App. 7a. The Sixth Circuit concluded that appellants "have failed to allege an injury in fact and they therefore lack standing to pursue this action." *Id.*

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's standing decision in this case conflicts with the decisions of the Eleventh Circuit (in *Wooden v. Bd. of Regents of the University of Georgia*, 247 F.3d 1262, 1274-81 (11th Cir. 2001)), and the Fourth Circuit (in *Price v. City of Charlotte*, 93 F.3d 1241, 1246 (4th Cir. 1996)). Nor can it be reconciled with decisions in other circuits. The lower courts are obviously still confused by this Court's standing and liability decisions in the Equal Protection area, especially for past harms. Unfortunately, the brief per curiam decision in *Lesage* did not fix the problem because it did not resolve tensions in this Court's jurisprudence.

If the issue of whether defendants would have made the same decision even without considering improper factors like race (*i.e.*, the "same decision" question) is not a part of Article III standing, but instead part of the defendants' burden within the *Mt. Healthy* burden-shifting procedure, then the Sixth Circuit's decision placing the burden on plaintiff -- particularly on defendants' motion for summary judgment -- was plain error.

Even if defendants had supported their *ipse dixit* assertions -- that they would have used the rank order lists without change had they not been able to consider race -- with competent evidence, that position still would have raised significant questions. The rank order list was derived from a procedure that was not validated for job relatedness and had adverse impact. Other circuit courts generally have rejected the use of such tests in analogous circumstances. *E.g.*, *Griffin v. Carlin*, 755 F.2d 1516, 1528 (11th Cir. 1985); *Segar v. Smith*, 738 F.2d 1249, 1270 (D.C. Cir. 1984). This split on an important issue of proof and defense

under the civil rights laws also deserves this Court's attention.

I. Article III Standing

This Court has addressed the standards for recovery in a case alleging a Fourteenth Amendment violation in different types of cases: in standing cases, in cases addressing burden shifting mechanisms for plaintiff's recovery, and in cases identifying the kind of damages that can be recovered. Efforts to reconcile these lines of cases have caused the lower courts to reach widely disparate results. Several have noted the difficulty in reconciling this Court's cases and have sought additional guidance.

This section will first consider this Court's precedents, and then review the efforts of the circuit courts to interpret those decisions.

A. This Court's Precedents

This Court has identified three constitutional elements of standing. These elements are required by Article III, and are (1) an injury "in fact," *i.e.*, an injury that is concrete, particularized, and, if not already inflicted, imminent, (2) causation, between the allegedly illegal acts of the defendant and the injury "in fact," and (3) redressability of the claimed injury. *Steel Co. v. Citizens For A Better Environment*, 523 U.S. 83, 102-03 (1998).

For cases alleging Equal Protection Clause violations, this Court has asserted that the Article III injury "in fact" is the inability to compete on an equal footing. In *Heckler v. Mathews*, 465 U.S. 728 (1984) this Court considered an exemption to a pension-offset rule (requiring the reduction of

Social Security benefits by the amount of any government pension). The exemption applied to nondependent women, but not similarly-situated men. *Id.* at 733. Recognizing the possible illegality of that measure, Congress had provided that, were the exemption declared unconstitutional, the pension-offset rule would apply to those previously exempted (rather than it not applying to anyone). *Id.* at 734. Although the nondependent man who challenged the program thus would receive no additional benefits at all, *id.* at 737, this Court held that he nonetheless had standing to enjoin the unequal treatment because

> like the right to procedural due process, *see Carey v. Piphus*, 435 U.S. 247 (1978), the right to equal treatment guaranteed by the Constitution is not co-extensive with any substantive rights to the benefits denied the party discriminated against. Rather, as we have repeatedly emphasized, discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community, can cause serious noneconomic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group. *Id.* at 739-40.

See also Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, 508 U.S. 656, 658, 666 (1993) (contractors' association had standing to challenge "preferential treatment to certain minority-owned businesses in the award of city contracts" regardless of whether "one of its members would have received a contract absent the ordinance"; "[t]he 'injury in fact' . . . is the denial of equal treatment resulting from the

imposition of the barrier, not the ultimate inability to obtain the benefit"); *Regents of the University of California v. Bakke*, 438 U.S. 265, 281 n.14 (1978) (whether plaintiff would have been admitted to medical school in the absence of special program favoring minorities "is merely [a question] of relief").

Similarly, although not a standing case, this Court described the harm from discrimination in *Curtis v. Loether*, 415 U.S. 189, 195 n.10 (1974) by holding that "[a]n action to redress racial discrimination may also be likened to an action for defamation or intentional infliction of mental distress . . . 'under the logic of the common law development of a law of insult and indignity, racial discrimination may be treated as a dignitary tort'" *quoting* G. Gregory & H. Kalven, *Cases and Materials on Torts* 961 (2d ed. 1969).

The civil rights laws generally, and 42 U.S.C. § 1983 in particular, require full compensation for individuals whose rights have been violated. That includes compensation for non-economic injuries. *Memphis Community School v. Stachura*, 477 U.S. 299, 307 (1986) (42 U.S.C. § 1983 was designed to create a tort remedy for the victims of constitutional wrongs, and "compensatory damages may include not only out-of-pocket loss and other monetary harms, but also such injuries as 'impairment of reputation . . . personal humiliation, and mental anguish and suffering'" *quoting Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (ellipsis as in *Stachura*)).

In another line of cases, culminating in *Lesage*, this Court has identified the burden shifting mechanism for determining whether plaintiff can recover for the denial of a benefit. In *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977), this Court considered the claim of an

untenured teacher whose contract had not been renewed. One of the stated reasons (but not the only one) for that decision had been the teacher's public disclosure (to a radio station) of a memorandum from his principal concerning proper dress. *Id.* at 281-83 & 283 n.1. The District Court concluded that plaintiff had proven his claim for reinstatement with backpay by showing that his speech was protected by the First Amendment and that it was a "substantial" or "motivating" factor in the decision not to renew his contract. This Court agreed that Doyle's speech was protected by the First Amendment (*id.* at 284), but concluded that his showing that the speech was a "substantial" or "motivating" factor was insufficient to state a claim for reinstatement and/or backpay.[4] While it was proper to place such a burden upon the plaintiff, the Court ruled that the "District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." *Id.* at 287.

This Court never mentioned "standing" in *Mt.*

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[4] The decision makes clear that this Court was primarily interested in the specific "remedial action" ordered by the District Court, *viz.*, backpay and reinstatement. *Id.* at 284 ("We are not . . . entirely in agreement with [the District Court's] manner of reasoning from this finding [that the speech in question was protected] to the conclusion that Doyle is *entitled to reinstatement with backpay*"), 285 ("The difficulty with the rule enunciated by the District Court is that *it would require reinstatement* . . . even if the same decision would have been reached had the incident not occurred"), 286 (an employee who engaged in protected conduct "ought not to be able . . . to prevent his employer from assessing his performance record and reaching a decision *not to rehire* on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision") (emphasis added throughout).

Healthy or cited Article III. This Court never mentioned any other way that Doyle might have been injured aside from the nonrenewal of his contract, and never stated whether he would be entitled to relief for such injuries.

This Court did address those questions the following year in *Carey v. Piphus*, 435 U.S. 247 (1978). In that case, several students received 20-day suspensions from school without due process. *Id.* at 249-51 & 251 n.6. In considering the appropriate compensation for that constitutional violation, the Court turned to the common law of torts, which "over the centuries . . . has developed a set of rules to implement the principle that a person should be compensated fairly for injury caused by the violation of his legal rights." *Id.* at 257. These traditional damage rules provided "the appropriate starting point for the inquiry under § 1983 as well." *Id.* at 258.

In adapting these rules for a claim of deprivation of procedural due process, this Court noted that guarantees of such process "are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." *Id.* at 259. It noted with approval, citing *Mt. Healthy*, the holding of the court of appeals that the students would not be entitled to recover damages to compensate them for injuries caused by the suspensions if the school board could show on remand that the students would have been suspended even had a proper hearing been held. *Id.* at 260.

While rejecting the students' contention that a recovery for emotional distress caused by the deprivation of procedural due process itself should be presumed, the Court nonetheless held that the students could submit evidence of such emotional distress. *Id.* at 264 ("mental and emotional

distress caused by the denial of procedural due process itself is compensable under § 1983 . . . "). This Court also held that, even if the students would have been suspended had due process been provided, and even if those students did not suffer any other actual injury from the suspensions, they were still entitled to "nominal damages without proof of actual injury" because of "the importance to organized society that those rights be scrupulously observed." *Id.* at 266.

Finally, in the per curiam decision in *Lesage v. Texas*, 528 U.S. 18 (1999), issued as a summary reversal without benefit of briefing or oral argument, this Court considered the case of a rejected applicant to a Ph.D program in counseling psychology who claimed that his rejection was due to race discrimination.[5] The school moved for summary judgment and submitted affidavits that the applicant would not have been admitted even had the school not considered race at all. Citing *Mt. Healthy*, and this Court's "well-established framework for analyzing such claims," this Court rejected (and reversed) the Court of Appeals' ruling that "summary judgment was inappropriate on Lesage's § 1983 action *seeking damages for the school's rejection of his application* . . . even if [the school] conclusively established that Lesage would have been rejected under a race-neutral policy." *Lesage*, 528 U.S. at 20 (emphasis added). The statement of the damage claim at issue is at times referred to in just such limited language,

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[5] This Court gives less precedential weight to per curiam decisions decided without the benefit of briefing or oral argument. *E.g.*, *Hohn v. United States*, 524 U.S. 236, 251 (1998). Not only was *Lesage* such a decision, it also failed to reconcile various lines of authority or explicitly decide important issues presented by this case. *See* n.6 & accompanying text, *infra*.

i.e., as damages only for the failure to admit. *E.g.*, *id.* at 22 ("Insofar as the Court of Appeals held that petitioners were not entitled to summary judgment on Lesage's § 1983 claim *for damages relating to the rejection of his application for the 1996-97 academic year* even if he would have been denied admission under a race-neutral policy, its decision contradicts our holding in *Mt. Healthy*" (emphasis added)). However, other parts of the decision refer only to liability, and do not make it clear whether Lesage sought any other type of damages or whether the Court was ruling that such other damages were unavailable. *E.g.*, *id.* at 21 ("The government can avoid *liability* by proving that it would have made the same decision without the impermissible motive" (emphasis added)).

As a number of lower courts have noted, *Lesage* did not mention *Carey v. Piphus*, and did not explicitly rule on the availability of claims for mental distress damages or nominal damages for discrimination. *See, e.g.*, *Thigpen v. Bibb County*, 223 F.3d 1231, 1242 n.17 (11th Cir. 2000) (*Lesage* "did not decide explicitly whether or not other damages precipitated by the 'injury in fact' identified in *Northeastern Florida Chapter* are recoverable, including emotional damages . . . or nominal damages").[6]

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[6] *See also, e.g.*, *Saunders v. White*, 2002 U.S. Dist. LEXIS 3573, *46 n.21 (D.D.C. March 4, 2002) ("[U]sing the same decision defense to purge a plaintiff of standing is seemingly at odds with cases that hold that a person may recover damages for emotional distress caused by his having been denied due process of law, even though if he had received due process he would still have lost the cause in which the procedural violation occurred," *citing*, *inter alia*, *Carey v. Piphus* and *Price v. City of Charlotte*; "Before a lower court such as this reaches that conclusion [that the rule is different for due process and equal protection claims], however, a more definitive statement on the issue appears necessary than

(continued...)

Causation is an element of Article III standing, but it also a traditional element of a tort claim. This Court's decisions in cases like *Lesage* do not make clear which type of "causation" analysis is at stake, and, accordingly, have engendered confusion in the circuit courts.[7]

B. The Split In The Lower Courts

The courts below concluded that plaintiffs' failure to

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[6](...continued)
provided in *Lesage*"); *Comfort v. Lynn School Committee*, 150 F. Supp. 2d 285, 300 (D. Mass. 2001) ("the *Lesage* Court did not expressly consider whether the 'same decision defense' precludes the possibility of nominal damages . . . Furthermore, the *Lesage* Court did not explicitly overrule, let alone cite, the *Carey* holding or discuss its implications to § 1983 racial discrimination claims"); *Tracy v. Bd. of Regents Of The University System of Georgia*, 2000 U.S. Dist. LEXIS 11320, *13 (June 16, 2000) ("Whether the *Lesage* Court meant to overrule *Carey* is a valid question, since *Lesage*, a per curiam opinion issued with no oral argument or even briefing . . . failed to even cite *Carey*"), *aff'd in part, rev'd in part, Wooden v. Bd. of Regents of the University of Georgia*, 247 F.3d 1262 (11th Cir. 2001).

[7] This Court in *Lesage* asserted that, if it were undisputed that the same decision would have resulted even in the absence of race being a factor, "there is no cognizable injury warranting relief under § 1983." *Lesage*, 523 U.S. at 21. The Sixth Circuit here seemed to believe that this language referred to the "injury in fact" requirement in Article III standing jurisprudence (App. 6a), but this just cannot be correct. The failure to admit (in *Lesage*) or promote (as here) is plainly an injury in fact (as is the inability to compete on an equal footing). The "same decision" analysis simply suggests the absence of a causal connection between the defendants' discriminatory conduct and the failure to admit or promote. In short, if *Lesage* were actually a "standing" decision (despite its failure to mention that word), it would have been a case concerning the second element of Article III standing (causation) and not the first (injury in fact).

demonstrate that they would have been promoted had there been no discrimination undermined their Article III standing. Both the Eleventh and Fourth Circuits disagree, and other circuit court decisions cannot be reconciled with the decision below.

In *Wooden v. Bd. of Regents Of The University Of Georgia*, 247 F.3d 1262 (11th Cir. 2000), the court rebuffed the University of Georgia's claim that a rejected applicant lacked Article III standing to allege race discrimination. The university conceded that the white plaintiff (Mr. Green) in question did not receive a credit for being a minority, but claimed that he would have been rejected under any circumstances and thus lacked standing. The district court ruled that Green lacked standing, but the Eleventh Circuit reversed. Although that court clearly was referring only to standing for retrospective relief (*id.* at 1281 n.17), it found that Green had standing because he had been treated unequally during the admissions process. Considering *Northeastern Florida Contractors* and other standing cases, along with *Lesage*, it rejected the university's argument that Green lacked standing to seek retrospective relief because he would have been rejected even if he had received the bonus or if non-whites had not. The court held that this Court's "standing jurisprudence in this area unmistakably turns the focus away from that kind of *result-oriented* analysis and toward a *process-oriented* analysis that asks whether the plaintiff has actually been *exposed* to unequal treatment." *Id.* at 1279. It held that the university's argument

> goes less to standing than it does to Green's ability to succeed on the merits of his claim. A showing that Green was denied admission under race-neutral criteria, and that his application would have been handled in exactly the same way even if race were

> not a factor . . . . may well defeat Green's claim or establish a *Mt. Healthy* defense. But . . . the Supreme Court has chosen to define the relevant injury-in-fact without regard to the end result of the defendant's consideration of race. *Id.* at 1280.

Similarly, the Fourth Circuit, in *Price v. City of Charlotte*, 93 F.3d 1241 (4th Cir. 1996), concluded that seven white police officers had standing to sue for compensatory damages based upon City of Charlotte's race-based promotions practice even though "[a] substantial number of white officers who were not promoted had rankings superior to those of any of the [plaintiffs]" and the plaintiffs "would not have been selected for promotion" even in the absence of the racially-tainted process. *Id.* at 1244. The City of Charlotte argued that the officers' "roster rankings did not qualify them for promotion to police sergeant, and they thus were not entitled to individual relief in the form of damages." *Id.* Analyzing this Court's precedents in *Carey*, *Stachura*, and *Northeastern Florida Contractors*, the Fourth Circuit held that

> *Carey* and its progeny demonstrate that the injury [plaintiffs] suffered is the ignominy and illegality of the City's erecting a racial bar to promotions, and more importantly, that this injury can be compensable by damages, not merely declaratory or injunctive relief . . . [Plaintiffs] were not competing on a level playing field -- the cards were unlawfully stacked against them -- and this denial of equal protection constitutes injury in fact capable of supporting compensatory damages. These precedents also hold that [plaintiffs] may be entitled to compensatory damages for emotional distress . . . . *Id.* at 1248.

Similarly, in *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 346 (4th Cir. 2001) (Traxel, J., dissenting in part), *cert. denied*, 122 S. Ct. 1538 (2002), Judge Traxel concluded that a child who challenged the constitutionality of a quota system for a magnet school was entitled to nominal damages under *Carey* and *Price*:

> In order to recover nominal damages, [student challenging the system] need not prove that absent the unconstitutional policy she would have been admitted to the magnet program. The injury in the present case is not the ultimate inability to enroll in the magnet school, but the inability to compete for seats on an equal basis.

Cf. Kyles v. J.K. Guardian Security Services, Inc., 222 F.3d 289, 300 (7th Cir. 2000) (testers without any interest in the employment they sought had standing to sue for violations of Title VII; "We have long recognized that humiliation, embarrassment, and like injuries . . . . constitute cognizable and compensable harms stemming from discrimination").

While the decision of the Fifth Circuit in *Hopwood v. Texas*, 236 F.3d 256 (5th Cir. 2000), *cert. denied*, 533 U.S. 929 (2001) did not specifically address "standing" *per se*, its conclusions are clearly inconsistent with those of the Sixth Circuit in this case. Four students challenged the system of admissions at the University of Texas Law School, claiming that it improperly discriminated on the basis of race. In an earlier decision (*Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996)), the Fifth Circuit had agreed, and had remanded the case to allow the District Court to determine whether defendants could meet *their* burden under *Mt. Healthy*. *Hopwood*, 236 F.3d at 261. Upon remand, the District Court concluded that the law school had demonstrated that none of the

plaintiffs would have been admitted had race not been a consideration, but granted nominal damages and attorneys' fees. *Id.* at 261; *Hopwood v. Texas*, 999 F. Supp. 872, 923 (W.D. Tex. 1998), *aff'd*, 236 F.3d 256 (5th Cir. 2000).[8] The Fifth Circuit affirmed on both of these holdings.

In *Gudenkauf v. Stauffer Communications*, 158 F.3d 1074 (10th Cir. 1998), the Tenth Circuit concluded that a woman who had been fired in part because of her pregnancy, but who would have been fired anyway, was entitled to attorneys' fees and costs as a prevailing party under Section 107 of the Civil Rights Act of 1991 (42 U.S.C. § 2000e-5(g)(2)(B)). *See also Garcia v. City of Houston*, 201 F.3d 672 (5th Cir. 2000) (same result). It seems safe to say that the approach of the Sixth Circuit in this case would cast significant doubt on the constitutionality of Section 107.

Finally, in *Estate of Macias v. Ihde*, 219 F.3d 1018, 1028 (9th Cir. 2000), the Ninth Circuit upheld its traditional rule that a victim of a violation of Equal Protection was entitled to nominal damages, regardless of whether the more serious injury incurred (in this case, a wife's murder at the hands of her estranged husband) had been caused by the Equal Protection violation.

Treating the "same decision" inquiry as a part of

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[8] In an earlier decision, the District Court also had awarded the plaintiffs one dollar, relying upon *Carey v. Piphus* and recognizing the non-economic harm caused by discrimination. *Hopwood v. Texas*, 861 F. Supp. 551, 583 (W.D. Tex. 1994), *vacated and remanded*, 78 F.3d 932 (5th Cir. 1996). In that earlier decision, relying upon *Northeastern Florida Contractors*, the District Court specifically rejected defendants' contention that "plaintiffs lack standing in that none can show they would have been granted admission absent the challenged admissions policies." *Id.* at 567.

Article III standing has significant consequences. Perhaps most importantly, and illustrated by this case, plaintiffs have the burden of pleading and proving standing. Under *Mt. Healthy*, it is *defendants'* burden to show, by a preponderance of the evidence, what would have happened without the improper consideration. This is particularly important in cases involving race discrimination, where the hypothetical results are difficult to prove. *Toney v. Block*, 705 F.2d 1364, 1366 (D.C. Cir. 1983) (Scalia, J.) ("it is unreasonable and destructive of the purposes of Title VII to require the plaintiff to establish in addition the difficult hypothetical proposition that, had there been no discrimination, the employment decision would have been made in his favor").

Here, the courts below placed the burden on plaintiffs. *E.g.*, App. 6a-7a ("Plaintiffs have neither alleged nor shown that the City would have promoted them if the City had used a race-neutral system in its promotions of police officers"). Indeed, the City moved for summary judgment in July 1996 on plaintiffs' "standing" without submitting *any evidence at all* as to what it would have done in the absence of race preferences. Plainly, if the "same decision" question is an affirmative defense for the defendant, as *Mt. Healthy* plainly holds, the summary judgment motion should have been denied.

So, too, cases like *Carey*, *Price* and *Hopwood* suggest that nominal damages and/or emotional distress damages are available even when defendants meet the burden of showing (or it is undisputed) that the plaintiffs would not have received the benefit in question. Other cases suggest that damages like the cost of applying to a discriminatory process can be recovered. *Cf. Hopwood v. Texas*, 861 F. Supp. 551, 583 (W.D. Tex. 1994) (plaintiffs who would not have been admitted even in the absence of race discrimination

entitled to nominal damages and ability to apply without cost in future), *vacated and remanded*, 78 F.3d 932 (5th Cir. 1996). Obviously, that simply cannot be reconciled with a conclusion that the question is one of Article III standing.

Finally, because "standing" is an essential part of Article III subject matter jurisdiction, it must be considered apart from, and before reaching, the "merits." *Ass'n of Data Process Servicing Organizations v. Camp*, 397 U.S. 150, 153 (1970). When, as occurred here, a court concludes that a plaintiff in a removed case lacks standing, it must *remand* rather than dismiss. In this way, as well, then, the categorization of the "same decision" issue as a "standing" or a "merits" issue has significant consequences for the course of civil rights litigation.

II. Use Of Non-Validated Procedures

Apart from whether the "same decision" question under *Mt. Healthy* is a standing issue or a merits defense, this case also raises the issue of whether a defendant can defeat standing or escape liability by asserting that it *would have* relied on a promotion list that derived from a non-validated promotion procedure. The District Court specifically asserted that petitioners' "standing to challenge a discriminatory device" did not "turn[] on whether the device has been validated as being job-related." App. 22a. While not explicitly addressing the issue, the Sixth Circuit agreed by affirming the judgment of the District Court.

There are several appellate decisions from other circuits that have decided a very similar issue contrary to the courts below. In both *Segar v. Smith*, 738 F.2d 1249, 1270-71 (D.C. Cir. 1984) and *Griffin v. Carlin*, 755 F.2d 1516, 1527-28 (11th Cir. 1985), the courts concluded that when

statistics support a *prima facie* case of intentional discrimination by showing a wide gap between the demographics of the qualified population and the demographics of the defendant's employees, and the burden then shifts to the defendant to rebut that case by pointing to an explanation for the gap, the defendant cannot explain the gap with a procedure or qualification unless that procedure or qualification can meet the business necessity test.

Both courts concluded that it was unfair to allow a defendant accused of an illegal employment practice to escape liability by pointing to *another* illegal employment practice as the cause of plaintiffs' injuries. The same logic can and should be applied to the situation before the Court in this case, where the City claims that an illegal employment practice did not harm the plaintiffs because they would not have been hired due to *another* illegal employment practice. This is as if an employer that discriminated against a minority woman could defend a race discrimination claim by asserting that it would not have hired her because it also would have discriminated against her on the basis of sex.

Nor does it matter what race the plaintiffs happen to be, because everyone injured by an illegal employment practice is a victim of discrimination, and, indeed, has standing to seek redress for that practice. This is because Title VII provides that a charge with the EEOC, and a subsequent lawsuit, can be filed by a "person claiming to be aggrieved." 42 U.S.C. §§ 2000e-5(b), 2000e-5(f)(1). Such language reflects a Congressional intent to eliminate prudential barriers to standing. *Trafficante v. Metropolitan Life Ins.*, 409 U.S. 205, 208-09 (1972) (phrase "person aggrieved" in Sect. 3610 of the Fair Housing Act intended to permit standing as broadly as permitted under Article III, *citing*, *Hackett v. McGuire Bros.*, 445 F.2d 442 (3d Cir.

1971), which had held the same for Title VII); *Kyles*, 222 F.3d at 295, 298 (7th Cir. 2000) (citing appellate cases); *Fair Employment Council of Greater Washington v. BMC Marketing Corp.*, 28 F.3d 1268, 1278 (D.C. Cir. 1994). When standing is that broad, all those injured by a discriminatory practice have standing to sue. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 103 n.9 (1979); *Anjelino v. The New York Times Co.*, 200 F.3d 73, 89-91 (3d Cir. 1999) (where employer did not go below the first woman listed on hiring list, men who were not hired because they were below them on the list could sue for their injuries); *EEOC v. Bailey*, 563 F.2d 439, 452-54 (6th Cir. 1977) (whites deprived of the benefits of interracial association at work were harmed for purposes of Title VII); *Kozlowski v. Fry*, 2001 U.S. Dist. LEXIS 990, ** 15-17 (N.D. Ill. Feb. 5, 2001) (men not hired because of a hiring practice that had disparate impact against women were injured and had standing).

Petitioners here were harmed by the discriminatory preferences used by the City. To allow the City to escape liability by asserting that it would have reached the "same decision" because of some other unlawful criterion that harmed petitioners is, to say the least, counterintuitive. It is certainly counter to the rationale of the D.C. and Eleventh Circuits in a closely analogous circumstance. This Court should address the issue of whether reliance on a non-job related hiring practice with disparate impact is a permissible *Mt. Healthy* defense.

III. Damages Under *Carey*

As already noted, the decision of the court below is inconsistent with those circuit courts that have held that the plaintiff in a discrimination case, where the defendant meets

its *Mt. Healthy* burden, still can recover nominal, emotional distress, or other damages associated with harms other than the loss of the benefit. Given the tension noted by the lower courts between *Lesage* and *Carey*, this Court should take this case to determine whether such damages are still available in a suit under Section 1983.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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1. Opinion of the Court of Appeals for the Sixth Circuit (February 19, 2002)..... 1a

2. Opinion and Order of the United States District Court for the Western District of Tennessee, Western Division, on Defendants' Motion for Partial Summary Judgment (November 17, 1998)..... 8a

3. Opinion and Order of the United States District Court for the Western District of Tennessee, Western Division, on Plaintiffs' Motions to Reconsider, Amend or Remand (January 13, 1999)..... 19a

4. Opinion and Order of the United States District Court for the Western District of Tennessee, Western Division, of Dismissal as to Some Plaintiffs and Order of Dismissal Pursuant to the Consent Order of Settlement as to Remaining Plaintiffs (January 11, 2000)..... 30a

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 00-5227/5451

RUSSELL AIKEN, et al.,

Plaintiffs,

Nos. 00-5227/
5228/5451/5452

FRANK AMATO; KENNON CARLTON; TAMMY CLEVENGER; JAMES COATNEY; PAUL KEATING; RUSSELL LOLLAR; FREDERICK SANSOM; DANA STINE; ROBERT STONE; JAMES WILEY; JOHN WRIGHT,

Plaintiffs-Appellants (00-5227/5451),

v.

RICHARD HACKETT, Individually and in his Official Capacity as Mayor; JAMS IVY, Individually and in his Official Capacity as Director of Police; and the CITY OF MEMPHIS,

Defendants-Appellees.

Nos. 00-5228/5452
DON BOYD, et al.,
Plaintiffs,

WILLIAM ASHTON, KENNON CARLTON ; DANNY CARTER ; JAMES COATNEY; STEPHEN COMELLA; BILY GARRETT; THOMAS HELLDORFER; RICHARD KITCHENS; GEORGE MAXWELL; FREDERICK SANSOM; DALE SIMS; TOM SIMMONS; DANA STINE; ROY TIDWELL; JAMES WRIGHT,
Plaintiffs-Appellants (00-5228/5452),

v.

CITY OF MEMPHIS,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Tennessee at Memphis.
Nos. 89-02863; 90-02069-
Jerome Turner, District Judge.

Argued: June 7, 2001

Decided and Filed: February 19, 2002

JUDGES:
Before: KEITH, BATCHELDER, and MOORE, Circuit Judges.

OPINION BY:
ALICE M. BATCHELDER
OPINION:

ALICE M. BATCHELDER, Circuit Judge. Appellants are (or were) police officers for the City of Memphis, Tennessee (the "City"). Appellants are white. They appeal the district court's entry of partial summary judgment against them in this case about the City's affirmative-action program and police promotions. The federal district court entered partial summary judgment for the City because the court concluded that Appellants could not show the injury in fact necessary for Article III standing. That judgment became final when the district court entered an order dismissing the case in its entirety. We agree with the district court's reasoning and conclusion, and thus, we AFFIRM the district court's grant of partial summary judgment against the Appellants.

BACKGROUND

This appeal ends a long and bitter legal battle over how the City's affirmative-action program affected promotions in the City's police department. See generally *Aiken v. City of Memphis*, 37 F.3d 1155 (6th Cir. 1994); *Ashton v. City of Memphis*, 1996 U.S. App. LEXIS 34357, 1996 WL 748163 (published in table format at 105 F.3d 659) (6th Cir. Dec. 30, 1996). The City conceded that some plaintiffs had actually suffered an injury in fact; the City settled with those plaintiffs. Remaining are a group of Appellants--the *Ashton* plaintiffs--who were plaintiffs in *Ashton v. City of Memphis*, and a group of Appellants--the *Aiken* plaintiffs--who were plaintiffs in *Aiken v. City of Memphis*. Those cases ultimately were consolidated, and the City has not offered to settle with these plaintiffs.

The *Ashton* plaintiffs' case began in 1988 when the City had seventy-five openings for the rank of sergeant. Two hundred and ten officers competed for those seventy-five slots. The officers were ranked based upon what the parties call a composite score. The composite score was an amalgam of a weighted score from: (1) a hundred-question multiple-choice written test; (2) a performance-evaluation score; (3) an oral interview; and (4) seniority points.

The City created a list of competitors, ranking the 210 officer-competitors in descending order based solely upon each competitor's composite score. Thus, the officer with the highest composite score was listed first, and the officer with the lowest composite score was listed two hundred and tenth. Seven African-American officers scored within the top seventy-five. None of the *Ashton* plaintiffs did.

Citing two consent decrees entered in the decades-long litigation, the City concluded that it must promote twenty-six black officers to the rank of sergeant. The City achieved this goal by promoting the seven who had scored in the top seventy-five and nineteen who had not. As a result, nineteen white officers whose scores placed them in the top seventy-five composite scores were "bumped" or were refused promotions. Because none of the *Ashton* Appellants in this case scored in the top seventy-five, none of the Appellants were bumped.

The *Aiken* plaintiffs' case began in 1989, when another ninety-four slots opened up for sergeant. One hundred seventy-seven officers competed for those slots. Again, the City tallied composite scores for each competitor. Fifteen African-American candidates achieved composite scores that placed among the top ninety-four. Again, the City bumped white officers whose scores were among the top ninety-four in order to promote thirty-three black officers including eighteen whose scores fell outside the top ninety-

four. None of the *Aiken* Appellants scored within the top ninety-four.

The district court concluded that these plaintiffs lacked Article III standing because they could not show that they would have been promoted had the City not used a system of racial quotas. The following two excerpts from the district court's opinion summarize the district court's rationale:

Plaintiffs do not dispute, and have offered no evidence, that absent the City's use of affirmative action the promotions would have been made other than in accordance with strict rank-order.

***

The court finds that the evidence in the record shows that the plaintiffs in question were not ranked high enough to be considered for promotions absent the City's use of affirmative action. Accordingly, the court finds that under *Brunet* those plaintiffs are without standing to sue.

Ashton v. City of Memphis, No. 89-2863-TUA, Order On Defendants' Motion For Partial Summary Judgment at 10 & 11 (W.D. Tenn. filed Nov. 17, 1998) (citing *Brunet v. City of Columbus*, 1 F.3d 390 (6th Cir. 1993)).

DISCUSSION

To establish Article III standing, a litigant must show (1) an injury in fact; (2) a causal connection between the injury and the conduct complained of; and (3) that the injury will likely be redressed by a favorable decision. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992). For purposes of an Article III standing analysis, an injury in fact means "an invasion of a legally protected interest[.]" *Northeastern Fla.*

Chapter, Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 663, 124 L. Ed. 2d 586, 113 S. Ct. 2297 (1993). We review de novo a district court's ruling that a litigant could not plead or prove Article III standing. See *Am. Fed'n of Gov't Employees v. Clinton,* 180 F.3d 727, 729 (6th Cir. 1999) ("A party's standing is a question of law reviewed de novo.").

When plaintiffs allege a violation of the Equal Protection Clause in the context of a government program, courts must evaluate whether the claimed injury is one that invades a legally protected interest. If the plaintiffs allege that a racial preference cost them some benefit under a government program, those plaintiffs may have alleged an injury in fact. But if those same plaintiffs cannot also allege and show that "under a race-neutral policy" they would have received the benefit, those plaintiffs have not alleged an injury in fact because they have not alleged an invasion of some interest that the law protects. *Texas v. Lesage,* 528 U.S. 18, 20, 145 L. Ed. 2d 347, 120 S. Ct. 467 (1999), rev'g 158 F.3d 213 (5th Cir. 1998). Those plaintiffs lack Article III standing. See *Northeastern Fla. Chapter, Associated Gen. Contractors of Am.*, 508 U.S. at 666; Lesage, 528 U.S. at 20.

If, however, the plaintiffs allege some kind of on-going constitutional violation and seek forward-looking relief to level the playing field, then the plaintiffs need only show that the racial preference hinders their ability to "compete on an equal footing." That plaintiffs would not have received the benefit even absent the preference is irrelevant to an Equal Protection analysis. See *Lesage*, 528 U.S. at 21 (citing *Northeastern Fla. Chapter, Associated Gen. Contractors of Am.*, 508 U.S. at 666).

The Appellants here have failed to allege the invasion of a right that the law protects. They have neither alleged nor shown that the City would have promoted them if the City

had used a race-neutral system in its promotions of police officers. Phrased differently, it appears beyond debate that absent the forbidden criterion used by the City, the appellants still would not have been promoted to sergeant. The Appellants' composite scores (not the City's affirmative action program) kept them from being promoted. Moreover, the Appellants sought no forward-looking relief that would allow them to compete on an equal footing. That is, the Appellants do not allege the City's promotion system continues to disadvantage them in competing for promotions; they do not suggest that they now seek to level the playing field. Appellants have failed to allege an injury in fact and they therefore lack standing to pursue this action. Accordingly, we AFFIRM the judgment of the district court.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

WILLIAM ASHTON, et al.,

Plaintiffs,

V. NO. 89-2863-TUA

CITY OF MEMPHIS, et al.,

Defendants.

RUSSELL AIKEN, et al.,

Plaintiffs,

V. NO. 90-2069-TUA

CITY OF MEMPHIS, et al.,

Defendants.

[File Stamped and Entered on November 17, 1998.]

ORDER ON DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

The plaintiffs have alleged that the defendants' use of affirmative action in their promotional policies unlawfully denied plaintiffs certain promotions. Currently before the court is defendants' motion for partial summary judgment, which alleges that several of the plaintiffs do not have standing.

I. Standard of Review

The moving party is entitled to summary judgment where there is no genuine issue of material fact and the party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). When considering a motion for summary judgment, the court's function is not to weigh the evidence or judge its truth; rather, the court must determine whether there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986). The substantive law governing the case will determine what issues of fact are material. Street v. J.C. Bradford & Co., 886 F. 2d 1472, 1479 (6th Cir. 1989).

A summary judgment movant "bears the burden of clearly and convincingly establishing the nonexistence of any genuine issue of material fact and the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion." Kochins v. Linden-Alimak, Inc., 799 F 2d 1128, 1133 (6th Cir. 1986). Once met, the burden shifts to the non-moving party to set forth specific facts showing a genuine issue of triable fact. Fed. R. Civ. P. 56(e). To meet this burden, the non-movant must present sufficient countervailing evidence such that a jury could return a verdict favorable to the non-moving party. Anderson, 477 U.S. at 246-250.

II. Background

Plaintiffs are white police officers for the City of Memphis who were denied promotions to sergeant allegedly due to the City's use of affirmative action in the 1988 and 1989 promotional process. Plaintiffs assert claims under the United States Constitution, various federal statutes and various provisions of state statutory and common law.

The following facts are not in dispute. In 1988 and

1989 promotions within the Memphis Police Department were based on a procedure consisting of four components: 1) a performance evaluation; 2) a written test; 3) an oral interview; and 4) seniority. Numerical scores were given on the evaluation, test and interview criteria. These scores were weighted and totaled, and then points were compiled into a rank-order list.

In 1988, 210 officers competed for seventy-five promotions to the rank of sergeant. After the rank-order list was compiled, it was determined that only seven of the top seventy-five candidates, or approximately 9.3%, were black. In order to meet the goal of a consent decree entered between the City and the United States, however, the City promoted nineteen additional black officers who were ranked between 76 and 132 on the rank-order list.[1] Thus, twenty-six black officers were promoted to sergeant in 1988. Plaintiff Ashton represents a group of twenty-six white officers who were all ranked higher on the rank-order list than most of the black promotees, but who were not promoted to sergeant in 1988.

Similarly, in 1989, 177 officers competed for ninety-four promotions to the rank of sergeant. After the rank-order list was compiled, it was determined that only fifteen of the top ninety-four candidates, or approximately 16% were black. In order to meet the goal of the Consent Decree, however, the City promoted eighteen additional black officers who were ranked between 95 and 142 on the rank-order list. Thus, 33 black officers were promoted to

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[1] The original Consent Decree, approved by the court in 1979 and amended and reaffirmed by the parties in 1981, provided that "to the extent that qualified black applicants are available...the percentage of promotions awarded to blacks at each rank shall constitute at least the percentage which blacks constitute in the next rank below." The rank below sergeant is patrol officer. In 1988, 34.7% of patrol officers were black. Thus, the City ensured that 34.7% of the promotions to sergeant would go to black officers.

sergeant in 1989. Plaintiff Aiken represents a group of twenty-eight white officers who were all ranked higher on the rank-order list than most of the black promotees, but who were not promoted to sergeant in 1989.

III. Standing

A plaintiff seeking relief in federal court must display three elements to establish Article III standing. Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 663 (1993). First, the plaintiff must show an injury in fact. Second, the plaintiff must demonstrate that a causal relationship exists between the injury and the defendant's conduct. Third, the plaintiff must establish that the injury can be redressed by a favorable decision from the court. Id. The party invoking the court's jurisdiction bears the burden of establishing standing. Warth v. Seldin, 422 U.S. 490, 508 (1975).

The parties dispute whether several of the plaintiffs have met their burden of establishing standing. Defendants admit that a number of qualified white officers were not promoted even though they ranked higher on the rank-order list than certain black officers who were promoted. Defendants assert, however, that many of the plaintiffs would not have been promoted regardless of whether affirmative action provisions had been utilized. Specifically, defendants allege that sixteen of the plaintiffs represented by Ashton and thirteen of the plaintiffs represented by Aiken would not have been promoted even if black officers below the cutoffs had not been promoted, because those plaintiffs did not rank high enough on their respective rank-

order lists to be promoted absent the use of affirmative action.[2]

In Northeastern, several contractors challenged a set-aside program that awarded minority contractors construction jobs, regardless of whether they submitted the lowest bid. 508 U.S. at 658-60. The Eleventh Circuit found the plaintiffs lacked standing because they did not show that they would have obtained the jobs absent the set-aside program. Id. at 660. The Supreme Court reversed the Eleventh Circuit's decision, stating that:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.

Id. at 666. In other words, when challenging affirmative action, a plaintiff need not establish that he or she was denied a benefit, but need only show that a discriminatory classification prevents him from competing on equal footing. Id. see also Regents of Univ. of Cal v. Bakke, 438 US. 265, 280-281 (1978) (finding rejected white applicant

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[2] In their supplemental memoranda in support of their motions for partial summary judgment, defendants question the standing of several plaintiffs to challenge 1991 promotions to lieutenant. Defendants offer no evidentiary support for their assertion that the plaintiffs in question would not have been promoted even if defendants had made promotions in strict rank-order fashion. Accordingly, the court denies defendants' motion for summary judgment on this issue.

would have standing to challenge school's admission program which reversed 16 of 100 places in the entering class for minority students, even if applicant had been unable to prove he would have been admitted in the absence of the special program).

Ashton and Aiken assert that all plaintiffs which they represent have standing under Northeastern because all the plaintiffs were prevented from competing on an equal footing for a limited number of promotions. The fact that several of the plaintiffs would have received promotions is irrelevant, it is argued, because they are not suing for lost promotions, but for the opportunity to compete on equal footing. Since black officers were given a preference over white officers, it is alleged that the white officers are not able to compete on equal footing. On the other hand, defendants contend that Northeastern should be read more restrictively, and that where it is shown that plaintiffs are unqualified for a promotion independent of any alleged unlawful acts, they are without standing to challenge either the denial of the promotion or the procedure under which the promotions were made.

Both parties cite several non-Sixth Circuit decisions in support of their respective position. While this court is not bound to those decisions, it is bound to follow established Sixth Circuit precedent. Neither party has cited Brunet v. City of Columbus, 1 F. 3d 390 (6th Cir. 1993), however, which this court finds to be controlling.

In Brunet, the Sixth Circuit was faced with the standing of four male individuals who alleged that the city's use of affirmative action in hiring females denied them positions as firefighters. Id at 393-96. Similar to the case at bar, the city used multiple criteria in testing applicants for firefighter positions, and developed rank-ordered lists to determine who would be hired. All four plaintiffs completed the examination process and received rankings.

Id. In August of 1991 the city prepared to hire thirty-six firefighters, and, pursuant to a prior consent decree, it determined that the class would consist of the top thirty-four ranked and qualified men and two women. Id. at 397. In the absence of the consent decree, all thirty-six positions would have been filled by male applicants. Id. The plaintiffs sued on equal protection grounds alleging that the city's use of affirmative action denied them both seniority rights and the opportunity to be selected for the August 1991 class. Id. at 395, 398.

The Sixth Circuit cited Bakke and Northeastern as holding that in "the context of affirmative action programs, challenger the need only show that, but for the program, he would have been considered for the job, to satisfy standing requirements." Id. at 397. Applying this principle to the facts before it, the court found that the two plaintiffs in question did not have standing to challenge the city's use of affirmative action in the August 1991 firefighter class because they did not rank high enough to be considered even absent the city's alleged use of affirmative action. Put more succinctly, because the "consent decree did not adversely affect [their] selection to the August ,1991 training class," the applicants did not have standing to challenge the use of affirmative action in the class. Id. at 398-99. With respect to the two plaintiffs who were ranked high enough to be considered for the August 1991 class, the court held that they "need not show that they would have been selected for the position, but for the consent decree, [but] only that they would have been considered." Id. at 398 n.5. The court made no distinction between a challenge to the procedure under which the benefit was denied and a challenge to the denial of the benefit itself where the plaintiffs could not show a causal relationship between affirmative action and the denied benefit. It is clear that the court did consider the mandate of Northeastern, however,

because the court found three of the plaintiffs had standing to challenge the loss of seniority rights because those plaintiffs were harmed by "having to compete on equal footing with persons who do not belong in their class" for the benefits that come with seniority. Id. at 401.

Applying this framework to the case at bar requires this court to determine if the plaintiffs in question have presented any evidence that they would have been considered for promotions absent the City's use of affirmative action. Before the court can resolve this question, two issues need to be addressed. First, plaintiffs allege that the City was not bound by and did not follow the rank-order list in determining who was promoted. Plaintiffs therefore allege that the City's reliance on that list in determining which officers would not have received promotions is misplaced. Second, plaintiffs allege there were errors in the rankings on the list which would affect which plaintiffs would be entitled to promotions absent affirmative action.

Plaintiffs' first contention is without merit. Plaintiffs dispute: 1) whether the City was bound by the Consent Decree to make promotions strictly according to the rank-order list; and 2) whether promotions were actually made according to that list. Whether the City was bound to make promotions according to the rank-order list is irrelevant. See id. at 307 n.3 (noting that city's use of rank-ordering did not affect the court's determination where the city was not required to use rank-ordering under the consent decree and could have used alternative methods). What is important is whether the City actually used rank-ordering, which is the basis for defendants' contention that several plaintiffs would not have been promoted under rank-ordering even absent the use of affirmative action. Plaintiffs do not dispute that a rank-order list was compiled that reflected each applicant's combined score. Plaintiffs assert,

however, that this list was not followed in making promotions because the actual promotion list contained the names of lower-ranked black officers. The plaintiffs' argument is not well taken. Plaintiffs' entire complaint is premised on the City's failure to strictly follow the rank-order list through the inclusion on the promotion list of lower-ranked black officers. Plaintiffs do not dispute, and have offered no evidence, that absent the City's use of affirmative action the promotions would have been made other than in accordance with strict rank-order. Accordingly, the court finds use of rank-order is proper in determining which plaintiffs have standing before this court.

Plaintiffs also allege that there were errors in the rank-order list. Plaintiffs assert that if the scores of J. Wright and A. Locke had been properly tabulated, both of these challenged plaintiffs would have ranked high enough on the 1989 rank-order list to be entitled to a promotion absent the use of affirmative action. Defendants do not dispute this assertion, but based on plaintiffs' evidence assert that if plaintiff Comella's score was properly tabulated, he would move from ninety-fourth to ninety-seventh on the 1989 list, and would no longer be eligible for promotion based on strict rank-ordering. Neither party, however has alleged that absent this litigation a corrected list would have been compiled and used in determining who would be promoted. In other words, the mathematical accuracy of the original list is not at issue, but whether plaintiff officers on that list were denied equal protection of the law is. The original list was compiled and used in determining who would be promoted, and the plaintiffs' claims are based on the City's failure to follow that specific list. The court sees no legal reason to allow the parties to base their allegations on a corrected list never used in determining who would be promoted. Accordingly, the

court declines to adjust which plaintiffs have standing based on a mathematically corrected rank-order list which was not used.[3]

The court now turns its attention to whether there is evidence that the plaintiffs at issue would have been considered for a promotion under the original rank-order list absent the City's use of affirmative action. The court finds that the evidence in the record shows that the plaintiffs in question were not ranked high enough to be considered for promotions absent the City's use of affirmative action. Accordingly, the court finds that under Brunet those plaintiffs are without standing to sue.[4]

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[3] Plaintiffs also allege that three black officers who were promoted should not have been because of past drug use or physical limitations. Plaintiffs seem to argue that had these officers not been promoted three additional openings would have existed for white officers. Assuming for the sake of argument that plaintiffs are correct and that those officers should not have been promoted, plaintiffs have failed to establish what impact this had on the denial of their promotions. First, it is undisputed that the City intended to promote a specific percentage of black candidates. Thus, even if these three officers were excluded, plaintiffs have failed to establish that three other black officers would not have taken their place. Second, plaintiffs have not shown this court which, if any, of their number would become eligible for promotion were three additional spots to become open.

[4] Plaintiffs attempt to distinguish their equal protection challenge from their procedural due process and state based claims. However, plaintiffs have not shown how the type of claim at issue makes any difference in whether they have standing. Plaintiffs have not established how officers who would not have received a promotion in the absence of the City's use of affirmative action sustained a particularized injury; that a causal relationship exists between their failure to get promoted and the City's use of affirmative action; or how a favorable ruling from the court that the City's use of affirmative action was unlawful would result in their obtaining a promotion.

IV. Conclusion

For the foregoing reasons the defendants' motion for partial summary is granted.

IT IS SO ORDERED this 17th day of November 1998.

/S/_____
JEROME TURNER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

WILLIAM ASTON, et al.,

Plaintiffs,

V. NO. 89-2863-TUA

CITY OF MEMPHIS, et al.,

Defendants.

RUSSELL AIKEN, et al.,

Plaintiffs,

V. NO. 90-2069-TUA

CITY OF MEMPHIS, et al.,

Defendants.

[File Stamped and Entered on January 13, 1999.]

ORDER ON PLAINTIFFS' MOTIONS TO RECONSIDER, AMEND, OR REMAND

Presently before the court is plaintiffs' motion for this court to reconsider its order granting partial summary judgment to defendants, plaintiffs' motion to amend their complaint, and plaintiffs' motion to remand.

I. Motion to Reconsider

A. Standing

Plaintiffs have asked the court to reconsider an order docketed November 18, 1998, that granted defendants' motion for partial summary judgment in finding that several plaintiffs lacked standing. The court's order was based on Brunet v. City of Columbus, 1 F. 3d 390 (6th Cir. 1993), where the Sixth Circuit interpreted and applied Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656 (1993), and Regents of Univ. of Cali. v. Bakke, 438 U.S. 265 (1978), to find that certain plaintiffs did not have standing. This court applied the legal analysis stated in Brunet and found that the plaintiffs in question were similarly situated to those at issue in Brunet.

Plaintiffs offer four lines of reasoning in support of their motion to reconsider. First, plaintiffs argue that the Sixth Circuit misinterpreted Northeastern and Bakke in the Brunet decision. The court finds, however, that Brunet is a reasonable interpretation on Northeastern and Bakke. Furthermore, even if this court were to disagree with the Sixth Circuit's interpretation of Supreme Court precedent, it is not free to ignore it. The court's order made it clear that the court found Brunet to be controlling authority. Plaintiffs' argument that the Sixth Circuit misinterpreted Supreme Court precedent should be directed at the Sixth Circuit through an appeal rather than at this court through a motion to reconsider.

Second, plaintiffs argue that the standing holding in Brunet clearly conflicts with the more recent Supreme Court decision in Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), and Clinton v. City of New York, 118 S Ct. 2091 (1998). Plaintiffs correctly argue that if these more recent Supreme Court rulings effectively overrule Brunet, the court is no longer bound by Brunet but must instead follow the statements of the Supreme Court. The court finds, however, that Adarand and Clinton have no

effect on the underlying premises of Northeastern and Bakke as they were applied in Brunet. The court does not find that Adarand or Clinton modified Northeastern in any way relevant to the issue at bar. Indeed, plaintiffs' only citation of Adarand and Clinton are of passages where the Supreme Court cited and reiterated its holding in Northeastern.[1] The court does not see how the Supreme Court's subsequent reaffirmation of Northeastern changes the Sixth Circuit's interpretation of Northeastern. In other words, Brunet does not conflict with plaintiffs' cited passages in Adarand and Clinton any more than it conflicts with Northeastern itself, because the cited passages in Adarand and Clinton are merely reaffirmations of and citations to Northeastern.

Third, plaintiffs argue that the Sixth Circuit, sitting en banc, did not follow Brunet in Aiken v. City of Memphis, 37 F. 3d 1155 (6th Cir. 1994) (en banc). Plaintiffs argue that the standing of all plaintiffs was a

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[1] In a footnote, plaintiffs attempt to equate their position with that of the plaintiffs in Adarand with the following statement. "Likewise, in this case, all plaintiffs were denied a promotion because of defendants' racially discriminatory promotion practices, thus all plaintiffs have standing to claim damages." Plaintiffs offered no evidence to support this assertion in response to defendants' motion for partial summary judgment, and have not offered any evidence now. It is implicit in the court's order granting defendants' motion for partial summary judgement that the court found that the plaintiffs in question were not denied a promotion because of affirmative action but because they were not ranked high enough on the list to even be considered for a promotion. In fact, this is the key distinction between these plaintiffs and plaintiffs in Bakke, Northeastern, and Adarand. While the Supreme Court made it clear that in those cases that plaintiffs need not show that they would have obtained the benefit in the absence of a discriminatory barrier, the Court said nothing to indicate that plaintiffs would have standing in the face of a non-discriminatory impediment to their even being considered for the benefit.

central issue in Aiken, and that the Sixth Circuit did not find any of the plaintiffs to be without standing, essentially ignoring Brunet. Plaintiffs' argument is without merit. The only standing issue before the Sixth Circuit in Aiken was the plaintiffs' standing to argue that consent decrees had not been applied as written. Neither the Sixth Circuit opinion nor the underlying district court opinion addressed plaintiffs' standing to argue that the decrees had been applied in a manner that violates Equal Protection. Thus, Aiken had absolutely no effect on the continuing vitality of Brunet.

Fourth, plaintiffs argue that Brunet is factually distinguishable from case at bar. Plaintiffs assert that in Brunet the method of selecting firefighters had been validated as being job-related and that the use of rank order had also been validated. Plaintiffs then assert that the promotion selection procedures in this case were not validated as being job-related and were the very reason the City claimed it had to use affirmative action. Without addressing plaintiffs' offered factual distinction, the court finds that even if it were to agree with plaintiffs, such agreement would not affect its decision regarding standing. The court finds no merit in the argument that a plaintiff's standing to challenge a discriminatory device turns on whether the device has been validated as being job-related.

Accordingly, plaintiffs' motion to reconsider the standing issue is denied.

B. Promotional List

In its order granting defendants' motion for partial summary judgment the court addressed plaintiffs' argument that there were mathematical errors in the compiled rank-order list. Plaintiffs argued that had the list been properly tabulated, two plaintiffs in question would have moved up

high enough on the list to be considered for a promotion absent the use of affirmative action, and that the standing of those two plaintiffs should not be at issue. The court found that neither party had alleged nor offered evidence that a corrected rank-order list had been used, and dismissed plaintiffs' argument.

Plaintiffs now offer the affidavit of Lieutenant Joseph Wright, who is one of the two plaintiffs whose scores were incorrectly tabulated and who was denied standing by the court's order. The affidavit essentially states that it is department policy to promote individuals whom the department later determines should have been promoted but for mathematical error, and gives several examples of where that policy has been followed.[2] The affidavit is sufficient to convince the court that summary judgment is inappropriate with respect to the claims of Wright and Arlie Locke (who was the other plaintiff whose scores were incorrectly tabulated resulting in his being placed so far down the rank-order list as to include him in the group of plaintiffs found to be without standing).

In arguing for partial summary judgment, defendants did not dispute that Wright and Locke would have been higher on the rank-order list had their scores been properly tabulated. Defendants did contend that had a properly tabulated list been used, plaintiff Stephen Comella would have dropped down on the list to the point where he would not have standing. In their motion to reconsider, plaintiffs argue that not only should Wright and Locke move up on the list because they would have received promotions upon discovery of mathematical errors, but also

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[2] Defendants object to the court's consideration of Wright's affidavit arguing that there is no foundation for Wright's testimony about what the City would or would not do. The court finds that Wright's affidavit adequately demonstrates his personal knowledge of the City's alleged practice.

argue that Comella should not lose his stature as a plaintiff with standing because department policy also precluded stripping a promoted individual of a promotion based on later discovered mathematical errors. As evidence of this policy, defendants again offer the affidavit of Wright. There is a critical distinction, however, between Comella's situation and the situation of Locke and Wright. Locke and Wright have offered evidence that as soon as the City discovered its error, in the absence of affirmative action they would have received promotions.[3] Thus, although they were originally ranked too low to be considered for promotions even absent the use of affirmative action, they assert that their mutual ranks would increase when the City discovered the error and that the City would remedy the error. On the other hand plaintiffs argue that Comella should retain his standing because once an officer was promoted, the promotion would not be stripped based on mathematical error. However, it appears that Comella was not promoted. If Comella had been promoted, he would not be a part of this litigation. Plaintiffs have not offered any evidence that Comella would have been promoted based merely on his high ranking on the original list where the City subsequently found he should have been ranked lower. The court finds, however, that Comella may stay in this suit pending determination on department policies regarding mathematically corrected rank-order lists. If it is determined that the department does follow that policy alleged by plaintiffs, Locke and Wright will have standing but Comella will not. Otherwise the court's original order stands.

II. Motion to Amend

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[3] In fact, Wright states that based on the mathematically corrected list, he was promoted, but that the promotion was not made retroactive to the date he would have been promoted in the absence of affirmative action.

Plaintiffs ask the court for leave to file a Third Amended Complaint so that they may "clarify and to set forth with greater specificity their discrimination claims, violation of civil rights and negligence claims predicated on the City's violation [sic] the City Charter and City ordinance requiring the use of competitive job-related examinations." The court has examined plaintiffs' Second Amended Complaint, however, and finds it bereft of any allegation regarding the City's violation of the City Charter or Ordinance. In actuality, plaintiffs are asking not to clarify allegations in a Third Amended Complaint, but to add new claims based on the City's violation of the City Charter and City Ordinance. Plaintiffs' proposed Third Amended Complaint also includes a previously unalleged claim that the City discriminated against one of the plaintiffs because of her gender.

Pursuant to Rule 15 of the Federal Rules of Civil Procedure, a court may grant leave to plaintiffs to amend their complaint, and leave should be freely given where justice so requires. The Supreme Court analyzed Rule 15 in Forman v. Davis, 371 U.S. 178 (1962).

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason -- such as undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, be "freely given." Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave

> without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

Id. at 182. Given the circumstances of this case, and after review of plaintiffs' proposed amended complaint, the court denies plaintiffs' motion to amend.

Several factors weigh against granting leave to amend. Although no factor may be individually significant enough to persuade this court to deny plaintiffs' motion, the court finds that taken together the factors justify denying plaintiffs' motion.

Initially, the court notes that plaintiffs have offered no evidence, and have not argued, that justice requires the court to allow plaintiffs to amend. Instead, plaintiffs only cited reason for asking for leave to amend is to clarify what are actually previously unasserted claims.[4]

Turning to factors underlying denial of plaintiffs' motion, the court finds undue delay in plaintiffs' attempt to amend at this juncture in the proceeding. The Ashton litigation is more than nine years old, and the Aiken litigation is just short of being nine years old. As noted above, plaintiffs have offered no explanation for the delay in asking to amend. There is no evidence of new facts having recently been discovered such that plaintiffs could not have made these claims previously. To the contrary, the new allegations merely assert that the same conduct the City now has been alleged to have engaged in all along now gives rise to new claims predicated on that conduct

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[4] In response to plaintiffs' offered justification the court merely notes that it believes the parties and the court are well versed in the issues remaining for trial, and that further clarification is unnecessary. Furthermore, specifics are not required under the current framework of notice pleading.

allegedly violating the City Charter and City Ordinance. The court has not been made aware of any reason why these claims could not have been brought at the onset of this litigation.

Moreover, plaintiffs have been granted leave to amend previous complaints several times. Again, the court notes that plaintiffs have offered no jurisdiction for their "repeated failure to cure deficiencies by amendments previously allowed." Id.

The court also finds that granting leave to amend would prejudice defendants.[5] The new allegation of gender discrimination is clearly unrelated to the previous claims based on reverse discrimination, and to allow it at this late stage would unduly prejudice defendants. Defendants have filed numerous motions in opposition to plaintiffs' claims over the years, and will now be forced to respond to new claims and perhaps alter their entire litigation strategy.[6] Although this would not generally constitute prejudice to a defendant, the court finds that due to the age of the litigation and the failure of plaintiffs to bring these claims previously, defendants will be unduly prejudiced.

Accordingly, plaintiffs' motion to amend is denied.

III. Motion to Remand

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[5] This case is set for trial on February 16, 1999, approximately five weeks from now. A pretrial conference is set for January 21, 1999.

[6] To date, plaintiffs' complaints were premised on the notion that "promotional testing procedures utilized by the defendant...were substantially in compliance with all applicable laws and regulations." In addition to adding new claims, plaintiffs' proposed Third Amended Complaint seeks to change this language to read that such procedures "were represented as being substantially in compliance with all applicable laws and regulations."

Plaintiffs ask the court to remand to state court the claims of several plaintiffs the court has determined to be without standing. Pursuant to 28 U.S.C. § 1447(c), if at any time before judgment is rendered a district court to which a case has been removed determines that it lacks subject matter jurisdiction, the case shall be remanded back to state court.

Of the plaintiffs determined to be without standing, sixteen were originally part of the Ashton litigation, and thirteen were a part of the Aiken litigation. Only the Ashton litigation was removed from state court, thus, remand may only be appropriate with respect to the sixteen plaintiffs originally part of the Ashton litigation found to be without standing. Therefore, this order does not affect this court's previous order dismissing the claims of the thirteen Aiken plaintiffs found to be without standing.

When a district court finds that a plaintiff in a removed action is without standing to sue, the district court must, pursuant to 28 U.S.C. §1447(c), remand the case back to state court for lack of subject matter jurisdiction. Wheeler v. Travelers Ins. Co., 22 F.3d 534, 537 (3d Cir. 1994); Maine Ass'n of Interdependent Neighborhoods v. Commissioner, Maine Dep't of Human Servs., 876 F2d 1051, 1053 (1st Cir. 1989). See also Bzdzuich v. D.E.A., 76 F. 3d 738, 742 (6th Cir. 1996) (finding standing is necessary to retain subject matter jurisdiction); Flournoy v. Trust Co. of Columbus, 632 F 2d 461, 462 n.6 (6th Cir. 1980) ("Because standing is an element of the constitutional requirement of 'case or controversy,' lack of standing deprives the court of subject matter jurisdiction.") Accordingly, the court grants plaintiffs' motion to remand with respect to plaintiffs who were part of the Ashton action

brought in state court and subsequently found by this court to be without standing.[7]

IV. Conclusion

Plaintiffs' motion to reconsider is denied in part and granted in part. Plaintiffs' motion to amend the complaint is denied. Plaintiffs' motion to remand is granted in part. Plaintiffs William Ashton, Kennon Carlton, Danny Carter, James Coatney, Billy Garrett, Thomas Helldorfer, Richard Kitchens, George Maxwell, Frederick Sansom, Thomas Simmons, Dale Simms, Dana Stine, Roy Tidwell and James Wright are severed from the Ashton case and their claims are remanded to the Chancery Court of Shelby County, Tennessee.

IT IS SO ORDERED this 13th day of January 1999.

/S/_____
JEROME TURNER
UNITED STATES DISTRICT JUDGE

---

[7] Defendants urge this court to retain jurisdiction over plaintiffs' state law claims thus retaining subject matter jurisdiction and obviating the necessity to remand. Defendants misread the court's order granting their motion for partial summary judgment. That order found that the plaintiffs at issue were without standing to challenge the City's use of affirmative action on any ground, including state common law, statutory or constitutional grounds. Thus to the extent state law claims still exist, the plaintiffs in question are without standing to pursue them in this court.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

WILLIAM ASHTON, et al.
Plaintiffs,

v. No. 89-2863-TUA

CITY OF MEMPHIS, et al.
Defendants.

RUSSELL AIKEN, et al.
Plaintiffs,

v. No. 90-2069-TUA

CITY OF MEMPHIS, et al.
Defendants.

[File Stamped and Entered on January 14, 2000.]

ORDER OF DISMISSAL AS TO SOME PLAINTIFFS AND ORDER OF DISMISSAL PURSUANT TO THE CONSENT ORDER OF SETTLEMENT AS TO REMAINING PLAINTIFFS

All matters in controversy have been resolved with the entry of the following orders; (1) the order of November 17, 1998 granting defendants' motion for partial summary judgment, (2) the order of January 13, 1999 on

plaintiffs' motion to reconsider, amend or remand and (3) the Consent Order of settlement entered December 3, 1999.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the complaints of the *Ashton* plaintiffs, William Ashton, Kennon Carlton, Danny Carter, James Coatney, Stephen Comella, Billy Garrett, Thomas Helldorfer, Richard Kitchens, George Maxwell, Frederick Sansom, Dale Simms, Thomas Simmons, Dana Stine, Roy Tidwell and James Wright and *Aiken* plaintiffs Frank Amato, Kennon Carlton, Tammy Clevenger, James Coatney, Paul Keating, Russell Lollar, Frederick Sansom, Dana Stine, Robert Stone, James Wiley and John Wright, are hereby dismissed pursuant to the court's order of November 17, 1998 and January 13, 1999.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the cases of the *Ashton* plaintiffs, Don Boyd, Steve Cole, Dan Cook, Ronald Cummings, Danny O'Connor, Steve Roberson, Joseph Shelton, Ron Weddle, Willard Reed Westbrook, Joseph Wright and Own Yarbrough, and *Aiken* plaintiffs, Russell Aiken, Charles Barnes, Danny Carter, Stephen Comella, Harbert Essary, Barry Lane, Arlie Locke, Mark McClain, Frank McGowan, Danny O'Connor, Monte Perkins, Steve Rawie, Elton Smith, Jerry Tennyson, Daniel Wood and Joseph Wright are dismissed pursuant to the Consent Order of settlement, subject to the court retaining jurisdiction to enforce that order.

/S/_____
JEROME TURNER
UNITED STATES DISTRICT JUDGE
DATE: JANUARY 11, 2000

Supreme Court, U.S.
FILED
JUL 30 2002
OFFICE OF THE CLERK

(2)

No. 01-1707

IN THE

Supreme Court of the United States

WILLIAM ASHTON, *et al.*,

Petitioners,

v.

CITY OF MEMPHIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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RESPONSE TO QUESTIONS PRESENTED

The questions presented may be more accurately stated as follows:

1. Can plaintiffs, white males alleging Equal Protection Clause violations in the form of reverse race discrimination in job promotions, meet their burden of proving Article III standing, where the record shows that, due to their low ranking resulting from competitive testing procedures, they would not have been considered for the positions they sought, even in the absence of racial considerations; where the affirmative action program in question has long been discontinued; and where plaintiffs seek no forward-looking relief?

2. Without standing, can these plaintiffs challenge the validity of the competitive testing procedures that produced a rank order list, where the plaintiffs pled that that the procedures in question were valid and proper, and where in any event the issue of validity arose solely to protect minorities and women from the effects of past discrimination?

3. Can the plaintiffs raise an issue of damages without standing?

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STATEMENT

This case does not warrant the Court's attention. It is a fact-specific case and a poor candidate for addressing the issue of standing. Moreover, under this Court's well-established principles, and consistent with the decisions of nearly all other federal courts, Petitioners lack standing. Petitioners suffered no injury-in-fact since under no circumstances would they have been considered for the promotions they sought, even without the existence of the affirmative action plan which they challenge. Further, the affirmative action program in question terminated years ago, and Petitioners seek no forward-looking relief. The other two issues which Petitioners raise are tangential matters which likewise do not merit the Court's attention. The Court recently denied a petition for certiorari in a closely similar case arising out of the Sixth Circuit, *Yeager v. General Motors Corp.*, 67 F. Supp. 2d 796 (N.D. Ohio 1999), *aff'd*, 265 F.3d 389 (6th Cir. 2001), *cert. denied*, __ U.S. __, 122 S. Ct. 1299 (2002), and should likewise deny this one.

RESPONSE TO FACTUAL BACKGROUND AND PROCEEDINGS BELOW[1]

Respondent submits the following additional facts from the record:

Petitioners state that the November 1974 consent decree which settled the 1974 civil rights action brought by the United States Department of Justice precluded the City from using any standard for employment that did not validly

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1. Record references are to the Appendix filed with the Sixth Circuit Court of Appeals.

measure qualifications for the position. Petition at 3, citing *Aiken v. City of Memphis*, 37 F.3d 1155, 1158-59 (6th Cir. 1994) (en banc). It should be added that this decree arose in response to claims of discrimination with respect to African American and female individuals. Its stated purpose was "to insure that blacks and women are not placed at a disadvantage by the hiring, promotion and transfer policies of the City, and that any disadvantage to blacks and women which may have resulted from past discrimination is remedied so that equal employment opportunities will be provided to all." *Aiken*, 37 F.3d at 1158. The decree identified a "long term goal . . . subject to the availability of qualified applicants" of "achieving throughout the work force proportions of black and female employees in each job classification, approximating their respective proportions in the civilian labor force." *Id.* at 1159. Thus the concern over validity of standards was aimed at the protection of minorities and females. Petitioners, current and former patrol officers for the Memphis Police Department, are white males.

Likewise, the March 1979 consent decree that arose from 1975 litigation initiated by the Afro-American Police Association provided that the use of a properly validated test would serve as a defense to any failure to promote African Americans in the percentages set forth in the decree. *See Aiken*, 37 F.3d at 1164 and *Ashton v. City of Memphis*, 49 F. Supp. 2d 1051, 1060 n.6 (W.D. Tenn. 1999).[2] Again, test validity was designed to protect minorities, on the implicit assumption that any problems with validity would adversely impact minorities and, correspondingly, favor whites.

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2. Subsequent consent decrees reaffirmed the essential purposes and features of the earlier decrees. *Aiken*, 37 F.3d at 1159-1160.

As the Sixth Circuit Court of Appeals noted, the City conceded that some of the original plaintiffs suffered an injury in fact and had standing, those white officers who would have received promotions if they had not been "bumped" by African American officers pursuant to the affirmative action program. The City settled with those plaintiffs, leaving in this litigation only those officers who were far down the ranking list. *Aiken v. Hackett*, 281 F.3d 516, 518 (6th Cir. 2002). This group, the Petitioners, is comprised of 15 original plaintiffs from *Ashton v. City of Memphis*, 1996 U.S. App. LEXIS 34357, 1996 WL 748163 (published in table format at 105 F.3d 659 (6th Cir. Dec. 30, 1996), and 11 of the original plaintiffs from *Aiken v. City of Memphis*, 37 F.3d 1155 (6th Cir. 1994).

In their description of the 1988 and 1989 promotion procedures about which they complain, Petitioners fail to highlight several important points.

First, the promotional process which the City used was incorporated into the applicable Memorandum of Understanding ("MOU") between the City and the Memphis Police Association, the recognized representative of the employees in certain ranks of the Police Department. Apx. 196.

Moreover, although the 1988-1989 promotional process had not been formally validated under EEOC guidelines, Petitioners' Second Amended Complaint, their final pleading, declared that "[t]he promotional testing procedures utilized by the defendant were fair and racially neutral and were substantially in compliance with all applicable laws and regulations, . . . and . . . all employees had an equal opportunity to compete for the promotions according [to]

the terms of the [MOU]."[3] Apx. 93. The MOU was negotiated with the understanding that the promotional procedures would be implemented consistent with the affirmative action provisions of the then-pending court-approved consent decrees designed to remedy any past discrimination within the Police Department. Apx. 281.

After completion of the competitive stages of the promotional process, the City's Police Director conferred with City representatives, including City personnel and attorneys, regarding the results of the process, its impact upon minorities, and what steps were needed in order to assure compliance with the applicable consent decrees. Apx. 479.

Petitioners also fail to make clear that based on their test scores and resulting rank order, under no circumstances, even without an affirmative action decree in place, would they have even been considered for promotion to sergeant. The following facts demonstrate this point.

In 1988, a total of 210 officers (including the *Ashton* plaintiffs) competed for 75 openings for the rank of sergeant. Apx. 197. The applicants were ranked in accordance with a composite score, as described in the Petition. Among the top

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3. Petitioners claim that they later realized that this allegation in their Second Amended Complaint was not true, and note that Fed. R. Civ. P. 15(b) allows for the liberal amendment of pleadings. Petition at 9-10 n.7. In essence they now ask this Court to grant them an amendment, or to treat their pleadings as if they had been amended. That is hardly an appropriate request to direct to the United States Supreme Court. As Petitioners concede, a formally validated promotion procedure went into effect in 1995. Petition at 5-6.

75 scorers were seven African-Americans and none of the present plaintiffs. Apx. 197. To comply with the then-outstanding consent decrees, the City "bumped" 19 white officers who had scored within the top 75 competitors to make room for 19 African Americans who had not scored within the top 75. Apx. 154. None of the present plaintiffs were bumped. Apx. 154; *Aiken*, 281 F.3d at 518.

In 1989, a total of 177 officers (including the *Aiken* plaintiffs) competed for 94 openings for the rank of sergeant. Apx. 467. The same tests and composite scores were used. This time 15 African-American candidates scored within the top 94. *Id.* None of the present plaintiffs did. *Id.* Again to comply with the consent decrees, the City promoted those 15, plus another 18 African-American candidates whose scores fell below those of the top 94. *Id.* Accordingly, the City found it necessary to bump 18 whites among the top 94 scorers. *Id.* Once again, none of the present plaintiffs were bumped. *Id.*; *Aiken*, 281 F.3d at 518.

In this connection the district court found the following as fact:

> Plaintiffs do not dispute, and have offered no evidence, that absent the City's use of affirmative action the promotions would have been made other than in accordance with strict rank-order.
>
> * * *
>
> The court finds that the evidence in the record shows that the plaintiff in question were not ranked high enough to be *considered* for promotions absent the City's use of affirmative action.

Ashton v. City of Memphis, 49 F. Supp. 2d at 1051 (emphasis added), cited with approval in *Aiken*, 281 F.3d at 519.

After the 1989 promotions the City never again used affirmative action in promotions to sergeant, and in May 1997, with the entry of a Second Amended Consent Decree, the City formally discontinued the use of affirmative action in all its police promotional procedures. Apx. 273; *Ashton*, 49 F. Supp. 2d. at 1066, 1074. Petitioners seek no forward-looking relief.

The proceedings below are adequately set forth in the prior opinions of the district court and the court of appeals. Respondent would simply add that Petitioners originally asserted claims under a variety of federal and state laws, but that following the decision of the Sixth Circuit Court of Appeals in *Aiken v. City of Memphis*, 37 F.3d 1155 (6th Cir. 1994) (en banc), the only claim remaining is Petitioners' claim under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

REASONS FOR DENYING THE WRIT

There are no "compelling reasons" for the Court to grant this petition. S. Ct. Rule 10. This appeal represents a small final remnant of a matter which has been exhaustively litigated since 1974. All prior plaintiffs with any significant interests, both African-American and white, have had their claims resolved through final court decisions, consent decrees, and settlements. This appeal represents claims asserted by the last remaining group of white male police officers who claim the City denied them promotions to sergeant in 1988 and 1989. At that time certain African American officers were granted promotions pursuant to consent decrees containing

a race-based affirmative action plan designed to remedy the lingering effects of any past discrimination against minorities and women. The present plaintiffs (Petitioners) had no injury in fact not only in that they would not have received the promotions in question, but also because under the selection process, with their low test scores they would not even have been considered for the promotions under any circumstances, even absent the affirmative action plan set in place by the consent decrees. They were completely unaffected by the race-conscious system in place. Therefore they have no standing.

Moreover, the City discontinued its affirmative action program years ago. Further, these remaining plaintiffs seek no forward-looking relief.

All these factors distinguish this case from others in which standing has been found. Under principles which this Court has repeatedly articulated, there is no injury in fact. For the same reasons this unique case, which does not involve recurring events or any ongoing race-conscious system, does not present an appropriate vehicle for the Court to use in addressing standing.

The remaining issues identified by the Petitioners are peripheral questions, peculiar to the facts of this case. They do not meet the criteria for the Court to grant a petition, and they serve only to illustrate the point that this case does not present the kind of record suitable for Supreme Court review.

The district court decided these issues following a full exploration of the documented facts at trial, and issued detailed and specific findings of fact. The court of appeals examined the same record and reached the same conclusion.

The lower courts' determinations arose out of the particularized fact setting of this case. These are not circumstances likely to recur at any other time and place. As such, they do not commend themselves to Supreme Court review.

I. Article III Standing

This case presents no challenge to existing principles of the law of standing. The lower courts' rulings in the case at bar follow this Court's existing decisions on the law of standing, and they are consistent with decisions of nearly all other federal courts. Accordingly, even if Petitioners were correct in their assertion that there exists confusion on some points with respect to the law of standing, no such confusion exists under the facts of this case. This case is thus an inadequate vehicle for the Court to use in resolving any supposed conflict among the circuits.

A. The Results Below are Consistent with this Court's Established Jurisprudence.

The results in this case are well in line with this Court's previous rulings on the subject of standing. There is no need for the Court to grant the Petition simply to reiterate well-established principles.

The doctrine of standing is "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The threshold question in every federal case is whether the court has judicial power to entertain the suit. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). "[T]he party invoking federal jurisdiction bears the burden of establishing its existence." *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 104

(1998); *see also FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990). "[T]he standing question is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth*, 422 U.S. at 498-499.

In a series of cases this Court has articulated and refined the "the irreducible minimum" of standing as requiring a showing of three distinct elements:

> First, the plaintiff must have suffered an 'injury in fact' — an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of. . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. [citations omitted].

United States v. Hays, 515 U.S. 737, 742-43 (1995) (emphasis added), quoting *Lujan*, 504 U.S. at 560-561. Petitioners' alleged legally protected interest was neither concrete nor particularized, nor was it actual or imminent. For the reasons shown, it was conjectural and hypothetical: What promotions if any *might* they have received *if* there had been no affirmative action plan in place *and if* a different test had been used *and if* on that different test they could have scored high enough to become eligible for available slots? Further, there plainly is no causal connection between the injury (failure to receive a promotion) and the conduct complained of (implementation of an affirmative action plan), since,

as shown, the record reveals that these particular Petitioners would not have received promotions even if no affirmative action plan had existed, as their composite test scores failed to meet the cutoff point. Finally, it is speculative, indeed doubtful, that their alleged injury would be redressed by a favorable decision, as shown by the Petitioners' strained efforts to raise issues of test validity and damages.

Petitioners cite *Heckler v. Mathews*, 465 U.S. 728 (1984) in support of their argument that for standing purposes, injury-in-fact may be found where the challenged action has resulted in the plaintiffs' inability to compete on an equal footing. That case involved entitlement to government-guaranteed benefits (Social Security), as opposed to job promotions to which only qualified employees are entitled. Moreover, in *Heckler* the Court stressed that it recognized noneconomic injuries to victims of discrimination which has the effect of "perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community." *Id.*, 465 U.S. at 739-740. In this case Petitioners are not members of a disfavored group stigmatized as innately inferior; on the contrary, they challenge court-approved efforts to remedy discrimination against disfavored groups. Finally, as the Court later stressed, quoting from *Heckler*, even if a government actor discriminates on the basis of race, the resulting injury "accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct." *Allen v. Wright*, 468 U.S. 737, 755 (1984), citing *Heckler*, 465 U.S. at 739-740. As shown, Petitioners were not personally denied equal treatment by the challenged affirmative action program; they were completely unaffected by it. Those white males who were

personally denied equal treatment by the program, *i.e.*, those who were bumped by lower-scoring African American candidates, have had their interests recognized. Petitioners do not fit into that category.

Ignoring the teachings of this long-standing body of precedent, Petitioners rely heavily on their myopic reading of this Court's opinion in *Northeastern Fla. Chapter, Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656 (1993), where non-minority contractors challenged a municipal ordinance that gave preferential treatment to minority owned businesses (MBEs) in awarding contracts for city projects, resulting in awards to contractors who had not submitted the lowest bid. Specifically, the ordinance challenged in *Northeastern* "earmarked" certain projects for MBEs. Those projects were then "deemed reserved for minority business enterprises only," and non-minority contractors like the plaintiffs were barred from even submitting bids on (*i.e.*, being considered for) those projects. *Id.*, 508 U.S. at 658. The Court held that the non-minority contractors had standing to assert an equal protection challenge to the ordinance even though they failed to allege that they would have been awarded past contracts had the set-aside program not been applied. The Court explained:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the

> denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.

Id. 508 U.S. at 666.

Several key distinctions between the facts and analysis in *Northeastern* and those of the case at bar reveal the fallacy of Petitioners' arguments based on that case. First, the ordinance in *Northeastern* involved a reservation or exclusive bidding restriction on certain predetermined projects. The plaintiffs were completely precluded from submitting bids on those projects; only MBEs were even considered for them. As a result, it was impossible to determine who would have received the bids in the absence of the set aside program. By contrast, the promotional process which Petitioners challenge in this case was open to all eligible candidates who wished to compete. As the district court observed, "there was no absolute bar to the promotion of white qualified candidates in 1988 or 1989, and in fact the majority of promotions went to such candidates." *Ashton*, 49 F. Supp. 2d at 1073. Petitioners competed head-to-head with minority candidates through each stage of the four-stage promotional process but failed to achieve scores high enough to be considered for promotion even before affirmative action was applied.

Second, the nature of the injury and relief claimed by the *Northeastern* plaintiffs distinguishes it from the present case. In *Northeastern* the claimed injury of the non-minority contractors was not that they had competed for, attempted to compete for, or had been denied a contract as a result of the ordinance, but rather that they would be prevented from competing for such projects in the future. Further, they sought forward-looking relief in the form of injunctive relief,

not backward-looking relief in the form of damages or in the form of awards of contracts already awarded. Petitioners here claim only a past injury (*i.e.*, promotions lost in 1988 and 1989), and seek only backward-looking relief in the form of, *inter alia*, retroactive promotions and damages for the loss of promotions awarded in the past.

Other decisions of this Court reiterating traditional principles of standing illustrate the limited nature of the holding in *Northeastern* and support the conclusion reached by the courts below in this matter.

In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), a case Petitioners ignore, the Court addressed a contract bidding scheme that favored minorities. Subcontractors who were not categorized as disadvantaged business enterprises ("DBEs") challenged the government's subcontractor compensation clauses which provided financial incentives to general contractors who subcontracted with DBEs on government projects. Both Adarand (a non-DBE) and Gonzales Construction Company (a DBE) were subcontractors who submitted bids to a general contractor for a highway construction project. *Id.*, 515 U.S. at 205. Adarand submitted the low bid, but due to the subcontractor compensation clause, the general contractor awarded the contract to the DBE. *Id.*, 515 U.S. at 209-10. Adarand sued to obtain both backward-looking relief for the lost contract and forward-looking relief for its inability to compete on equal footing with DBEs for contracts it would bid on in the future. *Id.*, 515 U.S. at 210-11.

With respect to Adarand's claim for backward-looking relief, the Court noted that "Adarand's allegation that it *has lost* a contract in the past *because of* a subcontractor

compensation clause . . . entitles it to seek damages for the loss of that contract. . . ." *Id.*, 515 U.S. at 210 (emphasis added). Moving then to Adarand's claim for forward-looking relief, the Court referred for the first and only time to its decision in *Northeastern*:

> If Adarand is to maintain its claim for *forward-looking relief*, our cases require it to allege that the use of subcontractor compensation clauses *in the future* constitutes "an invasion of a legally protected interest. . . . [citations omitted]." . . . Adarand need not demonstrate that it has been, or will be, the low bidder on a Government contract. The injury *in cases of this kind* is that a "discriminatory classification prevent[s] the plaintiff from competing on an equal footing."

Adarand, 515 U.S. at 211 (emphasis added), citing *Northeastern*, 508 U.S. at 667.

Thus, only in cases of forward-looking relief, and cases where it is impossible to identify exactly which plaintiffs were harmed by the challenged conduct, may it be appropriate to re-characterize the injury as denial of an opportunity to compete. Neither of those factual scenarios exist in this case. Petitioners seek no forward-seeking relief, and it is possible to identify precisely those who were impacted by the use of affirmative action.

With respect to the contract already competed for, the Court in *Adarand* applied a traditional standing analysis. The record established that Adarand had competed, that he was the low bidder, and that but for the subcontractor

compensation clause, he would have been awarded the contract.[4] Accordingly, there was no need to apply the *Northeastern* analysis to that claim for relief.

Adarand thus reinforces that in equal protection challenges to affirmative action such as that at issue here, where it is clear who would have been awarded the benefit in the absence of affirmative action, standing for purposes of backward-seeking relief is to be determined by whether the plaintiff *has lost* a benefit *because of* the alleged discriminatory barrier. As in *Adarand* with respect to the 1988 and 1989 promotions challenged by Petitioners, Petitioners competed in the process; it is known where they ranked following the competition; and it also known that the use of affirmative action had no impact on their ability to be promoted.

Under the principles set forth in *Northeastern* and *Alarand*, Petitioners lack standing. The Sixth Circuit recognized these principles in *Brunet v. City of Columbus*, 1 F.3d 390 (6th Cir. 1993), *cert. denied sub nom.*, 510 U.S. 1164 (1994), a case Petitioners likewise ignore. The Tucker plaintiffs in *Brunet* were male firefighter candidates who alleged that the hiring of certain female firefighters pursuant to the affirmative action provisions of a consent decree violated male applicants' equal protection rights. *Id.*, 1 F.3d at 392. The four Tucker plaintiffs competed for 36 available positions.[5] Tudor, Meyer and Hilleary ranked 36, 38 and 44, respectively. Tucker did not rank high enough to even be included on the eligibility

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4. The Court noted that Adarand submitted an affidavit from the general contractor stating that it "would have accepted Adarand's bid, had it not been for the additional payment it received by hiring Gonzales instead." *Id.*, 515 U.S. at 205.

5. The class was later enlarged to 38.

list. All four Tucker plaintiffs ranked above the highest ranking woman. Although the consent decree called for the top 34 and top two women to be hired, in the absence of affirmative action no women would have been hired. *Id.*, 1 F.3d at 398. Affirmative action was applied, and two women, both of whom ranked below the Tucker plaintiffs, were hired.

Relying partly on *Northeastern* in its ruling, the Sixth Circuit found it was possible under the facts of *Brunet* to determine who was affected by the use of affirmative action. The court held that, in the context of affirmative action programs relating to employment decisions, the challenger need not allege that he *would have obtained* the job but for the challenged barrier erected, but he must, at a minimum, show that but for the barrier, he would have been *considered* for the job. *Id.*, 1 F.3d at 397. Even under that analysis, however, the court noted that the two lowest ranking plaintiffs, Tucker and Hilleary, lacked standing to challenge the City's failure to hire them based on their respective rankings on the certified list for the incoming firefighter class.

> Tucker was not on the certified list for the August, 1991 class. Thus at this time, Tucker was not eligible for consideration. Moreover, Tucker's low rank would have eliminated him from consideration for the August, 1991 class. . . . Similarly, the consent decree did not adversely affect Hilleary's selection to the August, 1991 training class. . . . Assuming *arguendo* that the City would have still hired a class of 38 even in the absence of the consent decree, the facts show that the last candidate hired was Meyer, number 38. Under the

> Rule of Three, the City still would have only reached candidate 40 in its consideration for the 38th position in the class; Hilleary ranked 44.[6]

Id. 1 F.3d at 398-99. By contrast, plaintiffs Tudor and Meyer, who ranked 36 and 38, respectively, would have been considered for the 36th position and would have had standing.[7]

Other courts facing closely similar facts have reached similar conclusions. *See, e.g., Grahek v. City of St. Paul*, 84 F.3d 296, 298-99 (8th Cir. 1996); *Donahue v. City of Boston*, 183 F. Supp. 2d 202, 206-209 (D. Mass. 2001); *Yeager v. General Motors Corp.*, 67 F. Supp. 2d 796, 800-02 (N.D. Ohio 1999), *aff'd*, 265 F.3d 389 (6th Cir. 2001), *cert. denied*, ___ U.S. ___, 122 S. Ct. 1299 (2002); *Erwin v. City of Chicago*, 1998 WL 704295, 1998 U.S. Dist. LEXIS 15730 at *11-14 (N.D. Ill. Sept. 30, 1998); *McNamara v. City of Chicago*, 959 F. Supp. 870, 872 (N.D. Ill. 1997), *aff'd*, 138 F.3d 1219, 1221 (7th Cir.), *cert. denied*, 525 U.S. 981 (1998); *Paganucci v. City of New York*, 785 F. Supp. 467, 474-75 (S.D. N.Y. 1992), *aff'd*, 993 F.2d 310 (2d Cir.), *cert. denied*, 510 U.S. 826 (1993).

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6. Although the plaintiffs in *Brunet* filed suit prior to commencement of the August 1991 class, the determination of who would be included on the list and each individual's respective ranking had already been made. The court implicitly opined that although the Tucker plaintiffs specifically sought only future relief in their Complaint, had the City proceeded with hiring for the August 1991 class based upon the already-determined list, Plaintiffs Tucker and Hilleary would have lacked standing to challenge that process.

7. Because Tudor and Meyer were ultimately hired and included in the August 1991 class, however, their dates of hire were not affected by operation of the consent decree. Their claims for relief relating to their hiring became moot, and they lacked standing to challenge their hiring. *Id.* at 399.

Here, it is undisputed that Petitioners competed on equal footing for all available positions in the promotional process. Apx. pg. 97. They can show neither that they would have obtained a promotion nor that they would have been considered for promotion based upon their rank order standing in the absence of an affirmative action program. As noted by the district court, Petitioners' claims are analogous to the claims of Tucker and Hilleary in that the facts show that Petitioners ranked too low to be included among the top 75 individuals would have been considered for promotion in 1988, or among the top 94 who would have been considered for promotion in the 1989 process if the alleged racial barrier had never been applied. Apx. 136. Accordingly, the courts below correctly held that the Petitioners lack standing to challenge those promotions.

Petitioners' reliance on *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978), is misplaced. Bakke sued after twice being denied admission to University of California medical school due to the application of a "special admission program." Under the program, only "disadvantaged members" of certain minority races were considered for 16 of the 100 places in the entering class. Individuals eligible for the special admissions program competed for admission only against others in the program. Bakke, a non-minority, was denied admission under the school's general admission program while applicants with lower examination scores were admitted under the special admissions program.

The case came to this Court from the California Supreme Court, which had held that the special admissions program violated, *inter alia*, the Equal Protection Clause. *Id.*, 438 U.S. at 269, 278-79. Without addressing the equal protection claim, the California Supreme Court initially remanded the

case for consideration of whether the University could show Bakke would not have been admitted even in the absence of the special program. When the University conceded that it could not make such a showing, the state court ordered Bakke's admission. In a footnote in *Bakke* the Court credited the state court's finding that standing was conferred by "the University's decision not to permit Bakke to compete for all 100 places in the class." *Id.*, 438 U.S. at 268, 280 n.14. However, the Court made this observation only after noting the University's concession that it could not prove that Bakke would not have been admitted in the absence of the special program was enough to confer standing. *Id.* In *Bakke* the Court did not depart from its traditional standing requirement that a plaintiff must allege "facts from which it reasonably could be inferred that, absent the [alleged discriminatory barrier], there is a substantial probability that [plaintiff] would have been able to [obtain the benefit] and that, if the court affords the relief requested, the asserted inability of [plaintiff] will be removed," *Warth v. Seldin*, 422 U.S. at 504, or that the injury suffered by the plaintiff be "fairly traceable" to the defendant's allegedly unlawful conduct. *Allen*, 468 U.S. at 757.

Unlike Bakke, it is undisputed that Petitioners in this case would not have been promoted in the absence of affirmative action. Further, Petitioners here were not excluded from competing for available positions. They were permitted to, and did, compete for each of the projected number of promotions but failed to rank high enough (before affirmative action) to be considered for promotion. Although they have attempted to re-characterize their alleged injury during the course of this appeal, their ultimate claim is, and has always been, that after competing in a fair and racially neutral promotional process which demonstrated they would not

receive promotions, they were denied promotions. Their claims are, thus, more akin to the arguments of the plaintiffs in *Warth v. Seldin* and *Allen*, in which this Court found standing not to exist.

In the case at bar the Sixth Circuit properly relied on one of this Court's more recent pronouncements on the subject of standing in *Texas v. Lesage*, 528 U.S. 18 (1999), a decision Petitioners criticize. Petition at 19-21. In that case a university undisputedly considered race in its admissions decisions for a Ph.D. program. A rejected white applicant for the program sued for money damages and injunctive relief under, *inter alia*, 42 U.S.C. § 1983 and the Equal Protection Clause. Reversing the Fifth Circuit's reversal of summary judgment for the university, the Court explained the situation of a plaintiff who challenges an ongoing race-conscious program and seeks forward-looking relief:

> Simply put, where a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief under § 1983.
>
> Of course, a plaintiff who challenges an ongoing race-conscious program and seeks forward-looking relief need not affirmatively establish that he would receive the benefit in question if race were not considered. The relevant injury in such cases is "the in ability to compete on an equal footing." [citations omitted] But where there is no allegation of an ongoing or imminent constitutional violation to support a claim for

> forward-looking relief, the government's conclusive demonstration that it would have made the same decision absent the alleged discrimination precludes any finding of liability.

Id., 528 U.S. at 21.[8]

It is absolutely clear from the record in this case that the use of affirmative action had no impact on Petitioners' ability to compete for their ranking on the composite list or on their respective competitive positions on that list following the promotional procedure. If affirmative action had not been applied, only the highest ranking 75 (Ashton/1988) and highest ranking 94 (Aiken/1989) individuals from the composite list would have been considered for promotion and/or ultimately promoted. All the Petitioners ranked below 75 and 94, respectively. A mere allegation of racial preference is insufficient to confer standing, especially where, as here, the preference had no impact on these Petitioners' ability to compete for or obtain the benefit claimed.

In sum, well-established principles set forth by this Court show that Petitioners lack standing because they could not demonstrate that they would have been considered for promotion, or that they were prevented from competing on an equal footing with other candidates for promotion. Further, they do not challenge an "ongoing race-conscious program" and do no seek "forward-looking relief," *Lesage*, 528 U.S. at 21, but rather seek backward-looking damages only for

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8. The Court noted that the Fifth Circuit failed to distinguish between Lesage's retrospective claim for damages and his forward-looking claim for injunctive relief based on continuing discrimination. *Id.*, 528 U.S. at 21.

themselves. There is no injury in fact, nor any causal connection required in order to invoke standing before the federal courts. The lower courts correctly so held, and no useful purpose would be served by the Court granting the Petition sole to restate its prior holdings.

B. The Results Below are Consistent with Decisions of Other Federal Appellate Courts.

In an effort to portray a split in the lower courts, Petitioners cite cases in two circuits other than the Sixth Circuit, *Wooden v. Board of Regents of the Univ. System of Georgia*, 247 F.3d 1262 (11th Cir. 2000) and *Price v. City of Charlotte, N.C.*, 93 F.3d 1241 (4th Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997). Yet it is unclear that either of these courts would have decided this case differently.

In *Wooden*, various unsuccessful applicants for admission to a state university challenged the university's freshman admissions policies as impermissibly favoring non-whites over whites. Petitioners omit some critical facts of that case, facts which reveal why the principles enunciated in *Wooden* would have led to the same conclusion which the courts below reached on the facts of the present case.

In *Wooden* the university's challenged system divided the admissions policy into three stages. At the initial stage (the "AI stage"), the university automatically admitted applicants with academic indices and scores above a certain number, automatically rejected those below a certain level, and set aside for "further evaluation" the group whose numbers fell in a middle ground. All decisions at the AI stage were made without regard to race. However, for those middle-level applicants set aside for further evaluation, race was one factor among others that were considered.

In their summary of *Wooden* Petitioners refer only to the claim of Mr. Green, a white applicant whose indices and test scores enabled him to pass the AI stage, where race was not considered, placing him in the pool for further evaluation, where race was considered. He was ultimately denied admission, and he asserted that the university's race-conscious system placed him at a disadvantage. The Eleventh Circuit Court of Appeals held that Green had standing to assert his claim, because he reached the second stage of the process, and at that point he could not compete on an equal footing with non-white applicants. He thus suffered a "direct exposure to unequal treatment." *Id.*, 247 F.3d at 1280. By contrast, another white applicant, Ms. Davis, was rejected during the race-neutral AI stage of the process because her academic performance fell below the minimum requirements for passage into the next stage; that is, she was never even considered for admission because her numbers were too low. Citing this Court's decisions reviewed above, the Eleventh Circuit held that Davis lacked standing, since she had no injury in fact:

> [Davis'] position would virtually abolish the injury-in-fact requirement in this context, conferring a cognizable injury on every unsuccessful applicant for a government contract or admission to a public university where the process at some stage or for some purposes disfavors the applicant's racial group in favor of another, *regardless* of whether the plaintiff herself was actually treated unfairly. The law does not go that far.

Id., 247 F.3d at 1282 (emphasis in original).

Similarly, in this case Petitioners never passed beyond the first stage in the promotions process because their composite scores were too low. At that point all applicants were treated the same, regardless of race. Petitioners therefore had no "direct exposure to unequal treatment." Only in the second stage of the process was an applicant's race considered. Under the *Wooden* analysis, as under the Sixth Circuit's analysis in this case, Petitioners lack standing. There is no "conflict" for this Court to resolve.

Price is a closer decision; Respondent disagrees with the result in that case. However, there is at least one critical distinction between *Price* and the case at bar. The district court opinion in *Price* reveals that injunctive relief was sought and awarded in order to address an ongoing race-conscious promotions system, *Hayes v. City of Charlotte, N.C.*, 802 F. Supp. 1361, 1377 (W.D.N.C. 1992), a crucial factor absent from the present case. Moreover, the Fourth Circuit's opinion in *Price* focuses largely on issues of damages rather than standing. *Price* by itself hardly creates an inter-circuit conflict on the law of standing sufficient to warrant this Court's attention.

Finally, Petitioners cite three other decisions, *Hopwood v. Texas*, 236 F.3d 256 (5th Cir. 2000), *cert. denied*, 533 U.S. 929 (2001), *Gudenkauf v. Stauffer Communications, Inc.*, 158 F.3d 1074 (10th Cir. 1998), and *Estate of Macias v. Ihde*, 219 F.3d 1018 (9th Cir. 2000). None of these cases address the issue of standing. Accordingly, they do not represent the presence of a conflict in the law of standing which this Court needs to resolve.

II. Test Procedures

In a classic red herring, Petitioners ask the Court to hear their challenge to the validity of the test procedures giving rise to the rank order list, by which they failed to qualify for consideration for the promotions in question. This is plainly improper given the record and procedural posture of this case.

First, as shown, in their final pleadings Petitioners affirmed the validity of the test giving rise to the rank order. Apx. 93.

In any event, the issue of test validity arose in the context of assuring that the test would be free from any bias that would prejudice minority or female candidates; thus any invalidity would presumably favor the Petitioners, who are white males. *Aiken*, 37 F.3d at 1158, 1159, 1164; *Ashton*, 49 F. Supp. 2d at 1060 n.6. Further, it is undisputed that a formally validated test was developed in 1996, settling the matter in terms of any prospective action or relief. *Ashton*, 49 F. Supp. 2d at 1060.

Finally, as shown by the cases Petitioner cites (Petition at 27-29), this issue goes to the merits of the case, not to the question of standing. As for the merits, this Court has held that "even if the government has considered an impermissible criterion in making a decision adverse to the plaintiff, it can nonetheless defeat liability by demonstrating that it would have made the same decision absent the forbidden consideration." *Lesage*, 528 U.S. at 20-21 (citing *Mt. Healthy City School Dist. Board of Education v. Doyle*, 429 U.S. 274, 287 (1977).

III. Damages

Petitioners also wish to raise issues relating to damages. Once again, the record and procedural posture of this case reveal the impropriety of raising the issue at this point. Without standing, not even the threshold issue of liability is reached, much less the subsequent question of damages. There is no substantial conflict or confusion on theses issues that would justify the Court's granting the petition.

CONCLUSION

For the foregoing reasons the petition should be denied.

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IN THE

Supreme Court of the United States

WILLAM ASHTON, *et al.*,

Petitioners,

v.

CITY OF MEMPHIS,

Respondent.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

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In its opposition ("City Opp.") to the petition ("Pet."), the City of Memphis repeatedly asserts that petitioners were not harmed by the discrimination that undisputedly violated the Constitution because (1) merely being treated unequally is not a harm unless one also would have received a benefit and (2) petitioners would not have received a promotion because they were too far down a promotion list created from an unvalidated procedure. The first proposition is a question of law with which, as we pointed out in our petition, many lower courts disagree.

The second proposition relies entirely upon the unstated assumption that the City would still have used the list created from an invalid procedure (albeit in a race-neutral way) had it not been using "affirmative action." *E.g.*, City Opp. 21 ("If affirmative action had not been applied, only the highest ranking 75 (Ashton/1988) and highest ranking 94 (Aiken/1989) individuals from the composite list would have been considered for promotion and/or ultimately promoted"). As the petition points out, there is not a shred of evidence in the record to support this unstated assumption (and, thus, the City's conclusions). The City does not cite any. There is not a shred of evidence because the lower courts, assuming this question to be one of *standing* (instead of a defense under *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977)), placed the burden on plaintiffs to show that the City *would not* have used the list from the invalid procedure. *Compare Toney v. Block*, 705 F.2d 1364, 1366 (D.C. Cir. 1983) (Scalia, J.) ("it is unreasonable and destructive of the purposes of Title VII to require the plaintiff to establish in addition the difficult hypothetical proposition that, had there been no discrimination, the employment decision would have been made in his favor"). Thus, the resolution of the standing issue would have an immediate and obvious effect on this case: the order granting defendants' summary judgment motion on standing, submitted without any evidence at all, would be reversed.

The City's other reasons to deny the petition range from the meritless to the misleading.

1. There is a circuit split, and the City cannot really dispute it. It concedes that *Price v. City of Charlotte*, 93 F.3d 1241 (4th Cir. 1996) cannot be reconciled with the Sixth Circuit's approach, and it disagrees with the result. City Opp. 24. It refers to some factor present in the district court opinion in *Price* concerning injunctive relief, and asserts that the court of appeals focused "largely on issues of damages rather than standing." *Id.* But the holding in *Price* is unambiguous: "[Plaintiffs] have *standing* to sue to recover compensatory damages" even though they "would not have been promoted." *Price*, 93 F.3d at 1244 & n.1 (emphasis added).

The City tries to move the Eleventh Circuit's decision in *Wooden v. Bd. of Regents of the University of Georgia*, 247 F.3d 1262 (11th Cir. 2001) to its side of the circuit split ledger, but it does so in an improper and misleading way. The City does not argue that the standard in the Eleventh Circuit is the same as the standard it and the Sixth Circuit espouse. Nor could it. *Compare* City Opp. 15 ("standing for purposes of backward-seeking relief is to be determined by whether the plaintiff *has lost* a benefit *because of* the alleged discriminatory barrier" (emphasis in original)) *with Wooden*, 247 F.3d at 1278 (rejecting university's identical argument that an applicant has standing only if "the candidate could show that he was knocked out because of race").

The City only argues that petitioners in this case would have lacked standing under the City's interpretation of the Eleventh Circuit's standard, as well as the Sixth's. It does this by misrepresenting the facts: it asserts that the promotions in the police department at issue here were pursuant to a two-part process and "all applicants were treated the same, regardless of race" (City Opp. 24) in the "first" part where petitioners were eliminated. The City does not explain this two-part process at all. It cannot be reconciled with any description of the facts in any lower court, none of which referred to a "two-part" process. The primary fact identified by the District Court, which the City does not dispute, is that petitioners here had higher rankings than most

of the African American officers who were promoted. App. 10a-11a. Thus, the City's assertion that "it is undisputed that Petitioners competed on equal footing for all available positions in the promotional process" (City Opp. 18) is outright false; if it were true, petitioners would have been selected before those of a different race with lower composite scores. How can anyone in good conscience assert that race was not a factor under those circumstances?

The City then ignores the decisions from other circuits, the outcomes of which are irreconcilable with the decision here. Pet. 24-25; City Opp. 24. It is true that those cases did not specifically address "standing" (*but see* Pet. 25 n.8). But standing must be considered before the merits (*Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998)), and is part of a Court's Article III subject matter jurisdiction that a Court must consider *sua sponte* even if not raised by the parties or the trial court (*id.* at 93). Thus, those Courts cannot have used the Sixth Circuit's standard for assessing standing; if they did, they would have been obligated to *sua sponte* dismiss the case before reaching the merits.[1]

Finally, the City does not dispute that the Sixth Circuit's approach would raise grave doubts about the

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[1] The City identifies various other lower court cases that arguably agree with the Sixth Circuit's approach. Only one of those cases is from a court of appeals, and the court of appeals in question (the Eighth) has not been terribly consistent on this question. *E.g.*, *Edwards v. Jewish Hospital*, 855 F.2d 1345, 1348 (8th Cir. 1988) (discharged employee can sue for racial discrimination under 42 U.S.C. § 1981 even though he would have been discharged anyway); *Bibbs v. Block*, 778 F.2d 1318, 1323 (8th Cir. 1985) (en banc) (employee denied promotion stated Title VII claim; "A defendant's showing that the plaintiff would not have gotten the job anyway does not extinguish liability").

The City also lengthily discusses another Sixth Circuit case, *Brunet v. City of Columbus*, 1 F.3d 390 (6th Cir. 1993). City Opp. 15-18. We concede that the lower court decisions in this case are consistent with other Sixth Circuit opinions.

constitutionality of Section 107 of the Civil Rights Act of 1991 (42 U.S.C. § 2000e-5(g)(2)(B)). Pet. 25.

2. The bulk of the City's opposition discusses this Court's cases and tries to distinguish most of those cases from the facts here. City Opp. 8-15, 18-22. There is no case from this Court exactly on point; if there were, we give the courts of appeals enough credit to presume that there would not be a circuit split. Accordingly, it is not necessary to address the City's analysis of those Supreme Court cases, with the exception of the following brief notes.

First, and perhaps most remarkably, the City does not bother even to mention *Carey v. Piphus*, 435 U.S. 247 (1978) despite the fact that it was identified in one of the Questions Presented, discussed at length in the petition, and relied upon by various lower court cases cited in the petition. Petition i, 18-19, 20-21 n.6.

Second, the City tries to distinguish *Heckler v. Mathews*, 465 U.S. 728 (1984), and its discussion of the noneconomic and stigmatizing harms caused by discrimination, by claiming that petitioners here cannot have suffered such harms because they "are not members of a disfavored group stigmatized as innately inferior." City Opp. 10. Mr. Mathews was a male alleging gender discrimination.

Third, the City tries to distinguish the Court's standing holding in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) by asserting that this Court's "inability to compete" ruling came "only after noting the University's concession that it could not prove that Bakke would not have been admitted in the absence of the special program . . ." City Opp. 19. Again, this is quite misleading. The Court's ruling on "inability-to-compete" standing was a separate holding. *Bakke*, 438 U.S. at 280-81 n.14 ("Second, even if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing").

Finally, the City discusses *Lesage v. Texas*, 528 U.S. 18 (1999) (City Opp. 20-21) without identifying its most salient characteristic for this case: it never mentions the word "standing." Indeed, unlike "standing" cases, and the decisions of the courts below here, *Lesage* (like *Mt. Healthy*) plainly puts the burden of showing that the same decision would have been made squarely on the government. City Opp. 21 (*quoting Lesage*, 528 U.S. at 21). As the City (perhaps inadvertently) concedes, *Lesage* involves a merits issue. City Opp. 25 (citing *Lesage* as a merits case).

Ultimately, the City's contention is that the inability to compete is an "injury" only in certain kinds of cases. City Opp. 14. The City does not explain why this should be so. An injury is an injury, regardless of the kind of case in which it appears. Stigmatic harms associated with discrimination are either injuries or not. *Curtis v. Loether*, 415 U.S. 189, 195 n.10 (1974) (racial discrimination is a "dignitary tort"). If they are, there just is no good reason to consider them injuries in one set of cases but not another. Or, if there is a good reason, the City has not identified it.

3. The City offers little discussion on the second and third questions posed by the petition. It does not even properly identify the second question, which is this: can a defendant, either on a standing question or in presenting a *Mt. Healthy* defense, say that it would have relied upon a procedure that was itself discriminatory (because it was not job validated)? The City certainly makes no effort to refute the existence of a circuit split on that issue, or the third one.

CONCLUSION

The petition for a writ of certiorari should be granted.

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